FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 12 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 671

CARGILL, INCORPORATED,

Petitioner,

vs.

THE BOARD OF TRADE OF THE CITY OF CHICAGO, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

LEO F. TIERNEY,
LOUIS A. KOHN,
Attorneys for Cargill, Incorporated, Petitioner.

DORSEY, COLMAN, BARKER, SCOTT & BARBER,
1300 First National-Soo Line Building,
Minneapolis 2, Minnesota,
MAYER, MEYER, AUSTRIAN & PLATT,
231 South La Salle Street,
Chicago 4, Illinois,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Opinions Below	2
Statement	2
Questions Presented	7
Statutes Involved	7
Jurisdiction	8
Specification of Errors to be Urged	8
Reasons Relied On for Allowance of Writ	9
I. The Circuit Court of Appeals Has Decided Important Questions of Federal Law in a Way in Conflict With the Applicable Decisions of This Court	9
A. Respondents' action constituted "price-fixing" and was illegal *per se* under *U. S.* v. *Socony Vacuum Oil Co.*, 310 U. S. 150	9
B. The conduct of respondents constituted an unreasonable restraint of trade	13
C. Emergency Rule 251 of the Board of Trade does not render the conduct of respondents lawful	17
II. The Circuit Court of Appeals Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled by This Court	18
A. The Importance of the Chicago Board of Trade	19
B. Public Benefits of Hedging on Commodity Exchanges	19
C. Interference With Hedging by the Illegal Action of Respondents and the Public Detriment Caused Thereby	22
Conclusion	25

Appendix:

Clearing Trades on the Chicago Board of Trade.. 27

TABLE OF CASES.

Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 242 . 14
Anderson v. Shipowners' Association, 272 U. S. 359 .16, 17
Appalachian Coals, Inc. v. U. S., 288 U. S. 344, 360 ... 16
Associated Press v. U. S., 326 U. S. 1, 19, 27 .....14, 16, 18
Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 249 .....20, 27
Board of Trade v. L. A. Kinsey Co., 130 F. 507, 511 (C. C. A. 7-1904) 20
Board of Trade v. Olsen, 262 U. S. 1 .....14, 16, 20
Board of Trade v. U. S., 246 U. S. 231 .....6, 11, 12, 16
Crowley v. Commodity Exchange, 141 F. 2d 182 (C. C. A. 2-1944).....12, 13
Eastern States Retail Lumber Dealers' Ass'n. v. U. S. 234 U. S. 600, 611, 613 13
Fashion Originators' Guild of America, Inc., et al. v. Federal Trade Commission 312 U. S. 457, 465 14
Georgia v. Pennsylvania Railroad Co., 324 U. S. 439, 457, 459 .....14, 17
Nash v. U. S., 229 U. S. 373, 376 13
Paramount Famous Lasky Corporation v. U. S., 282 U. S. 30 9
Rice v. Chicago Board of Trade, 331 U. S. 247, 249-50, 253 .....14, 19
Standard Oil Co. v. U. S., 221 U. S. 1, 54 13
Sugar Institute v. U. S., 297 U. S. 553, 597, 599 13
Thomson v. Thomson, 315 Ill. 521 (1925)..... 12
U. S. v. Borden Co., 308 U. S. 188, 199-201 17
U. S. v. Linseed Oil Co., 262 U. S. 371, 388, 390.... 13

U. S. v. Patten, 226 U. S. 525, 543 .....13, 15, 16
U. S. v. Socony-Vacuum Oil Co., 310 U. S. 150 ..9, 11, 12, 17
U. S. v. South-Eastern Underwriters Association, 322 U. S. 533, 554 17
U. S. v. Tarpon Springs Sponge Exchange, 142 F. 2d 125, 127-8 (C. C. A. 5, 1944) 17
U. S. v. Trenton Potteries Co., 273 U. S. 392 11
U. S. v. Yellow Cab Company, 332 U. S. 218, 226 18
U. S. Alkali Export Association v. U. S., 325 U. S. 196, 206 17

MISCELLANEOUS.

Agriculture Dept. Circular No. 151: "Hedging in Grain Futures" (June, 1931).....23, 27
Baer & Woodruff, "Commodity Exchanges" (1929), p. 215 .....20, 21
Canadian Royal Grain Inquiry Commission Report (1923) 21
Clayton Act, §§ 4, 16 (15 U. S. C. §§ 15, 26).....2, 7-8
Commodity Exchange Act, § 3 (7 U. S. C. § 5) 19
Commodity Exchange Act, § 4a (7 U. S. C. § 6a) 20
Commodity Exchange Act, § 5, (7 U. S. C. § 7) 2
Commodity Exchange Authority Report: "Effect on Futures Trading in Grains of Changes in Price Ceilings of May 13, 1946" (Aug. 12, 1946) 1, 29
Federal Trade Commission Report: "Agricultural Income Inquiry" (1937, Part I) p. 348 22
Federal Trade Commission Report: "Economic Effects of Grain Exchange Actions, Affecting Futures Trading During the First Six Months of 1945" (Feb. 4, 1947) 1, 4, 27, 29, 30

Federal Trade Commission Report on the Grain Trade: "Effects of Future Trading" (1926) Vol. VII, pp. 259-60, 270, 382 ..... 3, 12, 20, 21

Harv. Law Rev. Vol. 54, 1373, 1374 (1941) 20

Hoffman: "Future Trading Upon Organized Commodity Markets of the United States", pp. 409-10 (1932) 20

Judicial Code, Sec. 240 (a), as amended by Act of Feb. 13, 1925, 28 U. S. C. § 347(a) 8

Sherman Act, § 1 (15 U. S. C. § 1) 2, 3, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

CARGILL, INCORPORATED,

Petitioner,

vs.

THE BOARD OF TRADE OF THE CITY OF CHICAGO, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Cargill, Incorporated, petitioner, by its attorneys, prays that a Writ of Certiorari issue to review the judgment of the Seventh Circuit Court of Appeals (R. 74) which affirmed an order of the District Court of the Northern District of Illinois, Eastern Division (R. 52), sustaining a motion to dismiss the complaint of petitioner charging a conspiracy in restraint of interstate trade and commerce in grain and grain futures and praying for damages and injunctive relief.*

* At least two federal agencies have submitted critical analyses of the situation involved in the instant case. See, Commodity Exchange Authority Report: "Effect on Futures Trading in Grains of Changes in Price Ceilings of May 13, 1946" (Aug. 12, 1946); also the Federal Trade Commission Report: "Economic Effects of Grain Exchange Actions Affecting Futures Trading During the First Six Months of 1946" (Feb. 4, 1947).

OPINIONS BELOW.

The memorandum opinion of the District Court (R. 49) is not officially reported, and the opinion of the Circuit Court of Appeals (R. 69)* is not yet reported.

STATEMENT.

The action arises under Section 1 of the Sherman Act (15 U. S. C., § 1) and Sections 4 and 16 of the Clayton Act (15 U. S. C., §§ 15, 26).

The pertinent facts set forth in the complaint and admitted by the motion to dismiss are as follows:

Petitioner, in the course of its business of merchandising, warehousing and distributing grain in interstate and foreign commerce, enters into futures contracts on respondent Board in "hedging" operations which are essential to petitioner's extensive financing requirements (R. 30-31). Accordingly, on May 12, 1946, petitioner was "long" more than 5,000,000 bushels of grain under futures contracts calling for delivery in May, July, September and December, 1946 (R. 34).

Respondent Board of Trade is a "contract" market so designated by the Secretary of Agriculture under Section 5 of the Commodity Exchange Act (7 U. S. C. § 7), and respondent Clearing Corporation is an affiliate of the Board.** The individual respondents are officers and directors of the Board or Clearing Corporation (R. 29-31).

* At the same time the Circuit Court of Appeals affirmed an order of dismissal in a similar action against respondents. *Belz* v. *Board of Trade* (No. 9439). Petitioner is advised that a petition for certiorari will also be filed in that case.

** See Appendix, p. 27, *infra*, for description of the method of clearing trades on the Board, and the part played therein by respondent Clearing Corporation.

On May 8, 1946, after governmental agencies had announced increased ceiling prices of grain, effective May 13, 1946, respondents, in order to protect from financial loss those on the "short" (*i. e.*, sellers) side of the market, engaged in a combination and conspiracy in restraint of interstate commerce in grain and grain futures in violation of Section 1 of the Sherman Act, to prevent the prices of grain futures contracts from reflecting the value of such grains, to control and fix the prices of such futures contracts, and to limit and restrict trading therein (R. 35-36). On May 12, 1946, respondent Board as a part of said conspiracy enacted Regulation 1894* (R. 43), which stopped trading in futures contracts calling for delivery of grains in May, July, September and December, 1946, except for the purpose of liquidation at the *old* ceiling prices in effect on May 11, 1946 (R. 36). * * None of these contracts could possibly be in default until the end of the respective delivery months involved. Regulation 1894 further provided for trading in *new* contracts calling for deliveries of wheat, oats, barley and rye in November and December, 1946, and of corn in January and March, 1947, at or below the *new* ceiling prices (R. 36).

As the result of Regulation 1894, petitioner's contracts were rendered valueless as a source of grain and as protection against price fluctuations, and the "shorts" were relieved of their obligation to deliver grain and to pay to respondent Clearing Corporation through their brokers the amounts which they would have otherwise been obligated to pay.

---

* It was recited therein that certain government agencies had "* * * requested and recommended to the governing boards of Grain Exchanges that all futures contracts open at the close of business on May 11th be settled at the then applicable ceiling prices * * *." (R. 43).

** Compare other action taken by respondent Board in 1917 (Report of the Federal Trade Commission on The Grain Trade: "Effects of Future Trading" (1926), Vol. VII, pp. 259, 382); and in 1943 and 1946 (Affidavit of Austen S. Cargill (R. 22)).

On May 21, 1946, petitioner filed its original complaint to enjoin respondents from carrying into effect Regulation 1894 (R. 2). Thereafter, on May 31, 1946, respondents adopted Regulation 1897, in effect rescinding Regulation 1894, with respect to *May* contracts, and providing for the settlement of grain futures contracts calling for delivery in May, 1946, at the *new* ceiling prices (R. 37, 44). On the same date they also adopted Regulation 1898,* which repealed Regulation 1894 and permitted trading in all futures contracts outstanding at the close of business on June 1, 1946, (including the July, September and December 1946 contracts) at or under the *new* price ceilings established May 13, 1946 (R. 37, 45).

Petitioner became entitled to $1,075,650.52 as the result of Regulations 1897 and 1898. However, on June 4, 1946, as a part of the conspiracy to save the "shorts", the Clearing Corporation notified its members that these regulations were being challenged in the courts, and that all amounts paid to traders thereunder should be returned to it in the event either or both of the regulations were ultimately held invalid. As a result of the notice petitioner received only $607,552.50 of the sum to which it was entitled (R. 38).

Later, anticipating the expiration of price controls on June 30, 1946, and as a part of the continuing combination and conspiracy to protect the "shorts",** respondents

* It appears from said Regulation (R. 45) that the Directors of the Board had asked certain government agencies to issue a directive embodying the governmental request recited in Regulation 1894 but that "the agencies have found, and still find, they cannot issue * * * [such directive]."

** As stated in the Federal Trade Commission Report (Feb. 4, 1947), *supra* (p. 28): "Naturally the financial interest of commission houses as well as speculators on their own account, both within the Board of Trade and outside its membership, would tend to make them favor closing out outstanding 'old' contracts at the old ceilings and starting trading anew with 'new' contracts." See also, Appendix, p. 30, *infra*.

caused the enactment of Regulation 1899 (R. 39, 46) on June 13, 1946, which stopped trading in grain futures contracts calling for delivery in July, September and December, 1946, and provided that they "be settled without delivery and by payment and acceptance of settlement prices, which shall be the closing price quotations of each of said futures on this Exchange on this day." Regulation 1899 was carried into effect with the result that the prices of said contracts were fixed at prices prevailing on June 13, 1946, although such contracts would not mature until the end of the named delivery months (R. 40).

On June 13, 1946, petitioner was "long" more than 5,000,000 bushels of various grains deliverable in the three months indicated. As the result of respondents' conduct it was deprived of the benefits of its contracts, and conversely the "shorts" were relieved of their obligations thereunder. Petitioner was thereby compelled to purchase cash grain wherever it could be found and at prices in excess of those provided in its futures contracts (R. 38-40).

Following the removal of OPA ceilings on June 30, 1946, the cash prices of grain advanced. But for the wrongful action of the respondents in the enactment of Regulation 1899, the prices of petitioner s futures contracts would also have similarly increased, and it thereby suffered further damage in the sum of $2,851,225.00 (R. 40-41).

The motion to dismiss challenged the sufficiency of the complaint* under the Sherman Act (R. 47). In sustaining the motion, the District Court (R. 49) apparently recognized that the conduct of respondents constituted price-fixing (R. 50) but held that under the Board's Rule 251**

---

* The Amended and Supplemental Complaint filed March 17, 1947 (R. 28).

** "251. Emergencies. The Board shall have power to declare any day to be a holiday or to close the Exchange or to stop trading in any security or in any of the future contracts of any

respondent Board had lawful authority to take the action complained of, stating (R. 51):

> "No board of trade or stock exchange could exist without some such rule as No. 251 above mentioned. Neither could the economic stability of any country be guaranteed in time of war or great emergency unless some power exists somewhere lawfully to control price and prevent extortionate settlements for those who had sold grains for future delivery."

The Circuit Court of Appeals in affirming the order of dismissal stated as to the conduct of respondents (R. 73):

> "* * * [it] was not price-fixing. It was the establishment of a measure of damages for the liquidation of the contracts terminated and in which there was to be no further trading."

And further (R. 73):

> "Neither is the termination and settlement an illegal restraint of commerce. Almost every act of an agency such as the Board and Clearing affects or restrains commerce in some respects, but such restraints as may be within the rule of reason are not unlawful." (Citing *Board of Trade* v. *United States*, 246 U. S. 231.)

---

commodity, by reason of any emergency or otherwise, and to make such Regulations in regard to deliveries and settlement prices as it may deem proper because thereof. All Exchange contracts shall be subject to the exercise of such power. Such contracts shall also be subject to the exercise by Clearing House of the powers reserved to the Clearing [illegible] its Charter, By-Laws, and Resolutions" (R. 9).

QUESTIONS PRESENTED.

The general question involved is whether the complaint states a cause of action under the Sherman Act; and in particular, whether the conduct of respondents in adopting and in enforcing Regulations 1894 and 1899, on May 12 and June 13, 1946, respectively, which stopped trading in grain futures contracts (not in default) and fixed settlement prices at those prevailing on said dates, constituted "price-fixing" condemned by the Sherman Act.

Even if such action be held not to constitute "price-fixing", the further question is presented whether the complaint otherwise alleges an unreasonable restraint of trade in violation of the Sherman Act.

STATUTES INVOLVED.

Section 1 of the Sherman Act:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *" (15 U. S. C., § 1.)

Section 4 of the Clayton Act:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (15 U. S. C., § 15.)

Section 16 of the Clayton Act:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws * * *." (15 U. S. C., § 26.)

JURISDICTION.

Judgment of the Circuit Court of Appeals was entered on December 23, 1947 (R. 74). Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the Act of Feb. 13, 1925, 28 U. S. C. § 347(a).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the complaint failed to state a cause of action under the Sherman Act.

2. In holding that the conduct of respondents complained of was legal and proper.

3. In holding that the complaint failed to allege facts entitling petitioner to the relief sought.

4. In affirming the judgment of the District Court dismissing the action.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

The Circuit Court of Appeals Has Decided Important Questions of Federal Law in a Way in Conflict With the Applicable Decisions of This Court.

In holding that the conduct of respondents in stopping trading in futures contracts and fixing settlement prices thereof at the prices prevailing months in advance of their maturity, did not constitute "price-fixing" or an unreasonable restraint of trade, the court below failed to follow the applicable decisions of this Court.

A. Respondents' action constituted "price-fixing" and was illegal per se under U. S. v. Socony Vacuum Oil Co., 310 U. S. 150.

The court below erroneously considered the action of respondents as "the establishment of a measure of damages for the liquidation of contracts terminated and in which there was to be no further trading" (R. 73).*

*Even if this analysis were correct, the action nevertheless amounted to an unreasonable restraint (see p. 13, *infra*). Cf. *Paramount Famous Lasky Corp.* v. *U. S.*, 282 U. S. 30, in which a standard exhibition contract providing for arbitration was held violative of the Sherman Act. In so holding, the Court stated (p. 43):

> "It may be that arbitration is well adapted to the needs of the motion picture industry; but when under the guise of arbitration parties enter into unusual arrangements which unreasonably suppress normal competition, their action becomes illegal."

This view ignores the fact that the contracts involved called for deliveries of grain in distant months, and that prior to the maturity of such contracts many conditions would have arisen to appreciably affect their ultimate value. Until the delivery month arrived, the exact measure of the liability of the "shorts" for a default could not be determined. Moreover, there was no certainty that defaults would occur. But for respondents' wrongful action, the prices of such contracts would have varied from day to day and from minute to minute. In requiring parties to be bound by a fixed price determined months in advance of delivery dates, respondents prevented normal price variations and arbitrarily measured the rights and liabilities under such contracts on the basis of existing prices. This is *price-fixing* and is not the "establishment of a measure of damages" or fact-finding essential in any real arbitration or true determination of damages which must, of course, be based on objective standards and supported by evidence.

Accordingly, the premature termination of such contracts and the arbitrary fixing of the prices thereof, measured by existing ceiling prices or by closing market quotations interfered with the free play of economic forces and thwarted the normal operation of a contract market as envisaged by the Commodity Exchange Act.

The economic rationalé underlying the rule against price-fixing clearly calls for its application here. A commodity exchange, in serving its proper function as an important institution in our economy, must permit full expression of the conflicting interests of buyers and sellers.

In *U. S.* v. *Socony Vacuum Oil Company,* 310 U. S. 150, the Court stated (pp. 221-223):

> "*Any combination which tampers with price structures is engaged in an unlawful activity.* Even though

the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference."

"• • • prices are fixed within the meaning of the *Trenton Potteries* case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. *They are fixed because they are agreed upon.* And the fact that, as here, they are fixed at the fair going market price is immaterial."

• • • • •

"And market manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone." (Italics ours.)

The action of respondents thus constituted "market manipulation" and "price-fixing" such as was condemned by the *Socony* case, and the court below was obviously in error in stating, with reference to that case and *U. S.* v. *Trenton Potteries Co.*, 273 U. S. 392, that "these cases do not define and delineate what is price-fixing" (R. 73).

Board of Trade v. *U. S.*, 246 U. S. 231, cited by the court below (R. 73), rather than supporting its decision, indicates that an illegal restraint of trade was imposed here. In that case the "Call Rule" of the Board was upheld as a reasonable restraint. The Court there pointed out (unlike the instant case) no attempt was made to show

that the rule "had the effect * * * of retarding or accelerating shipments; or of raising or depressing prices; or of discriminating against any part of the public or that it resulted in hardship to anyone * * *." In the *Socony* case, the Court, in distinguishing the *Board of Trade* case (310 U. S. at p. 217), pointed out specifically that the Call Rule was

> "not aimed at price manipulation or the control of market prices and * * * had 'no appreciable effect on general market prices' * * *."

The decisions relied upon below by respondents (but not cited by the court on this point) are also inapplicable. In *Thomson* v. *Thomson,* 315 Ill. 521 (1925), and *Crowley* v. *Commodity Exchange,* 141 F. 2d 182 (CCA 2, 1944), violation of the federal anti-trust laws was neither charged nor considered. Moreover, both decisions are clearly distinguishable on their facts from the instant case. In the *Thompson* case the closing market price on July 5, 1917 for the July futures closed out, was used as the "true commercial value" of the contract.* In the *Crowley* case, market quotations of the day on which performance was made illegal by *governmental* action

---

* In Report of the Federal Trade Commission on The Grain Trade: "Effects of Future Trading" (1926), Vol. VII, p. 259-60, it is stated in showing that even such a situation does not involve a true settlement on default since made "prior to the close of the delivery month":

> "Nature of Decreed Settlements.—The case of settlement on default is to be distinguished from the decreed or forced settlement. The former occurs after trading in the option to which the contract relates has run its course and expired. If the buyer on such a defaulted contract is willing to accept a belated delivery the obligation may be settled in that way. The buyer may also agree with the seller as to the amount to be paid in lieu of delivery. In the absence of a voluntary settlement accepted by both parties, the default is passed upon by a committee of the board which fixes a price and in addi-

were accepted as establishing the value on that date. It was not known when, if ever, this impossibility would be removed, and the effective date of the prohibition of delivery was taken as the date of the breach; and the value as determined by market quotations on that day adopted as a basis for settlement.

B. The conduct of respondents constituted an unreasonable restraint of trade.

Even if the court below were correct in holding that the conduct of respondents was not "price-fixing" and not illegal *per se* within the rule of the *Socony* case, it should, nevertheless, have found that such action constituted an unreasonable restraint of trade under the rules consistently laid down by this Court.*

---

tion a penalty for not specifically living up to the contract. Such a settlement on default can be made in the light of all the facts having a bearing on the value of the future contract in question. The option has expired and the prices on trades in the pit up to the end of the last day are known; all the conditions as to available cash supplies and as to prices in other markets during the life of the contract can be ascertained. None of these conditions applies where a settlement is forced prior to the close of the delivery month."

"* * * The decreed settlement was intended, indeed, to prevent anticipated future developments and was not merely a quasi-judicial determination of value or price with reference to completed events."

A fortiori the settlement of the prices of contracts maturing in distant months lacks the requirements of a "quasi-judicial" determination.

* *Standard Oil Co.* v. *U. S.*, 221 U. S. 1; *Eastern States Retail Lumber Dealers' Ass'n.* v. *U. S.*, 234 U. S. 600, 611, 613; *U. S.* v. *Patten*, 226 U. S. 525, 543; *Sugar Institute* v. *U. S.*, 297 U. S. 553, 597, 599; *Nash* v. *U. S.*, 229 U. S. 373, 376; *U. S.* v. *Linseed Oil Co.*, 262 U. S. 371, 388, 390.

The regulations of the Board now in question were without congressional sanction* and by arrogating unto themselves, a private body, the power to regulate interstate commerce, respondents unlawfully impinged upon the powers of Congress and violated the Sherman Act.**

The essence of a futures contract is its *price,* whether the contract is consummated by delivery or otherwise and whether the contract is employed as a source of supply or as a method of price insurance. The regulations of the Board under attack here vitally affected this integral feature of petitioner's futures contracts and thus, contrary to the Sherman Act, imposed an obstruction to, and burden upon, interstate commerce. See, Section 3 of the Commodity Exchange Act (7 USC § 5) for congressional recognition of the significance of such a restraint.

In *Board of Trade* v. *Olsen,* 262 U. S. 1, this Court stated in rejecting the attack then made by respondent Board on the constitutionality of the Grain Futures Act (p. 40):

> *"The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it.* By reason and authority, therefore, in determining the validity of this Act, we are prevented from questioning the conclusion of Congress that manipulation of the market for futures on the

---

* In *Rice* v. *Chicago Board of Trade,* 331 U. S. 247, 253 (n. 4) the Court in discussing the Commodity Exchange Act said that Congress "* * * did not undertake to put behind them [the Board's rules] civil or criminal sanctions" and that "we therefore have no attempt here to endow private groups with law-making functions * * *."

See also, *Georgia* v. *Pennsylvania Railroad Co.,* 324 U. S. 439, 459.

** *Addyston Pipe & Steel Co.* v. *U. S.,* 175 U. S. 211, 242; *Fashion Originators Guild* v. *Federal Trade Commission,* 312 U. S. 457, 465; *Associated Press* v. *U. S.,* 326 U. S. 1, 19.

> Chicago Board of Trade may, and from time to time does, directly burden and obstruct commerce between the States in grain * * *." (Italics ours.)

In *U. S.* v. *Patten*, 226 U. S. 525, this Court stated in holding that a corner of the cotton futures market constituted an unreasonable restraint of trade (p. 542):

> "It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it *also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition.*" (Italics ours.)

Further, petitioner's futures contracts contemplated delivery of grain, and petitioner had reason to rely on such contracts as a source of grain (R. 40). In relieving the "shorts" of their obligation to deliver grain and eliminating this source of supply, respondents prevented deliveries of grain and obstructed the free flow of commerce.

The direct and immediate effect of the combination and conspiracy charged by petitioner is thus clear: The value of petitioner's hedging contracts was destroyed; the operation of the laws of supply and demand were thwarted and prices of grain futures were prevented from reaching their proper levels; "shorts" were relieved of their obligations to deliver grain and of the financial burdens incidental to changes in prices; "longs" were deprived of the right to insist upon the delivery of grain and of the benefits to which they were entitled under their contracts; the natural flow of grain into the Chicago market was impeded; hedgers and speculators were deprived of the right to transfer their futures contracts to others who, in a free market, would

have been willing to assume the risks involved; and the credit of "hedgers" which is so largely dependent on the price protection furnished by hedging, was impaired (R. 40-41).

It is thus apparent that the action of respondents (in the language of the court in the *Olsen* case, *supra* (id. p. 39)) resulted in prices not responsive to supply and demand, discouraged hedging, disturbed the normal flow of actual consignments, and thus imposed an obstruction on the free flow of commerce. And, just as this Court held with respect to the corner and enhancement of prices in the *Patten* case, this amounted to an unreasonable restraint of trade.

In dismissing the complaint and not allowing petitioner an opportunity to prove its clear and positive allegations of an unreasonable restraint of trade, the court below also failed to follow the decisions of this Court recognizing the necessity, in such cases, for a consideration of extensive factual data relating to the business affected.

Thus, in *Board of Trade* v. *U. S.*, 246 U. S. 231, 238, it was stated:

> "To determine that question [illegal restraint of trade] the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."*

It is clear that the cause should have been remanded for trial as was done in *Anderson* v. *Shipowners' Association*,

* As stated by Mr. Justice Frankfurter in *Associated Press* v. *U. S.*, 326 U. S. 1, 27, whether there is an unreasonable restraint "* * * depends, in essence, on the significance of the restraint in relation to a particular industry."
See also, *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, 360.

272 U. S. 359; cf. *U. S.* v. *Tarpon Springs Sponge Exchange*, 142 F. 2d 125, 127-28 (CCA 5, 1944), so that all relevant considerations could have been shown by petitioner.

C. Emergency Rule 251 of the Board of Trade does not render the conduct of respondents lawful.

Congress has not granted the Board any exemption from the anti-trust laws. Although its activities have been regulated by the Commodity Exchange Act, Congress has not seen fit to endow the Board with any power to regulate interstate commerce. "Regulated industries are not *per se* exempt from the Sherman Act." *Georgia* v. *Pennsylvania Railroad Company*, 324 U. S. 439, 456. It is also clear that the Sherman Act is applicable to trading in futures contracts on the Board of Trade. *U. S.* v. *South-Eastern Underwriters Association*, 322 U. S. 533, 554 (n. 40). If Congress had intended to exempt the Board from the Sherman Act it would have clearly said so. *U. S.* v. *Borden Co.*, 308 U. S. 188, 199-201; *U. S. Alkali Export Association* v. *U. S.*, 325 U. S. 196, 206; *Georgia* v. *Pennsylvania Railroad Company*, *supra*, at pp. 456-457; *U. S.* v. *South-Eastern Underwriters Association*, *supra*, at pp. 553-554, 560-561. As stated in the *Socony* case, *supra* (at p. 222): "Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike."

Reliance of the court below upon Emergency Rule 251 of respondent Board (R. 72), in sustaining the legality of the acts in question, was therefore contrary to the decisions of this Court.

Thus, in *Anderson* v. *Shipowners' Association*, 272 U. S. 359, 362 this Court stated, with reference to the rules established for the employment of seamen whereby each

of the parties concerned "surrendered himself completely to the control of the associations" (p. 365):

> "• • • *These shipowners and operators having thus put themselves into a situation of restraint upon their freedom to carry on interstate and foreign commerce according to their own choice and discretion, it follows, as the case now stands, that the combination is in violation of the Anti-trust Act.*" (Italics ours.)

In *Associated Press* v. *U. S.*, 326 U. S. 1, the Court, after citing the *Anderson* case, stated (p. 19):

> "• • • arrangements or combinations designed to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose. • • •"

So, in the instant case, the rules and regulations of a private group cannot be used as a means to obstruct and restrain interstate commerce. As stated in *U. S.* v. *Yellow Cab Company*, 332 U. S. 218, 226, the Sherman Act is "designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved."

We therefore submit that the court below, in deciding important questions of federal law, has misinterpreted and failed to follow the applicable decisions of this Court.

II.

The Circuit Court of Appeals Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled by This Court.

The decision below, in destroying the sanctity of grain futures contracts, poses important questions as to the position of commodity exchanges in the economy of the nation and as to the power of private groups to regulate interstate commerce. It is imperative that this Court determine whether the action of a contract market in closing trading

in futures contracts and in enforcing a decreed settlement price *months prior to the arrival of the delivery dates involved* and before any actual defaults have occurred or may be imminent, constitutes the kind of "price-fixing" condemned by the Sherman Act, or otherwise amounts to an unreasonable restraint of trade. While it would seem clear that respondents' conduct runs afoul the anti-trust laws, the vital questions presented have, however, not heretofore been directly passed upon by this Court.

A. The Importance of the Chicago Board of Trade.

The Chicago market is the world's largest grain futures market,* and over 90% of grain futures trading in the United States is conducted on respondent Board, which has been designated as a contract market pursuant to the Commodity Exchange Act.

Transactions in grain futures on such markets "*are affected with a national public interest;*" and "the prices involved in such transactions are generally quoted and widely disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and consumer of [commodities] and the products and by products thereof;" and "such transactions are utilized by shippers, dealers, millers and others in interstate commerce *as a means of hedging themselves against possible loss through fluctuations in price.*" (Section 3, Commodity Exchange Act, 7 U. S. C., § 5.)

B. Public Benefits of Hedging on Commodity Exchanges.

In furnishing facilities for such hedging contract markets serve a vital function and play an important part in the economic progress of our nation. Hedging permits farmers, dealers and processors of grain who are con-

* See, *Rice* v. *Chicago Board of Trade*, 331 U. S. 247, 249-50, also R. 72, and para. 12 of the complaint (R. 31).

fronted with the risk of fluctuations in prices through ownership of grain to pass such risks to others who wish to assume them.* And as a result, many social and economic benefits inure to the public generally.

Thus, hedging has reduced the cost of handling commodities, so that the middle-man is willing to take a smaller margin of profit, and thus pay the producer a higher price and sell to the consumer at a lower price than would otherwise be possible. See, *Board of Trade* v. *L. A. Kinsey Co.*, 130 Fed. 507, 511 (C.C.A. 7 (1904)); affirmed *sub. nom. Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236; *Baer & Woodruff* "Commodity Exchanges" (1929), p. 215, and *Hoffman*, "Future Trading Upon Organized Commodity Markets of the United States", pp. 409-410 (1932).**

---

*In the Report of the Federal Trade Commission on The Grain Trade: "Effects of Future Trading," Vol. VII (1926), it is stated, (p. 33):

> "Hedging in grain-trade practice may be defined as a combination of transactions in cash grain and in futures such that a purchase of the former is accompanied by a sale of the latter in corresponding quantity and vice versa. Hedging ordinarily involves fourfold transactions—an initial purchase and an initial sale, one of the cash grain and the other of the futures, and the opposite closing transactions in each. By means of hedging, a loss on the cash grain will presumably be offset by a gain on the futures and vice versa."

See also, statement of Mr. Justice Holmes in *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 249; and also definition of "hedging" in Sec. 4a of the Commodity Exchange Act (7 U. S. C. § 6a), commented on in 54 Harv. L. Rev. 1373, 1374 (1941).

** In the brief filed by the Board in *Board of Trade* v. *Olsen*, 262 U. S. 1, it was stated (See, synopsis, p. 20, id.):

> "The bill avers and the evidence in the *Christie* case, 198 U. S. 236, showed that the grain buyers' profit in moving grain from the farmers to the foreign market—which formerly was from five to eight cents a bushel—had been reduced to not exceeding two cents a bushel by the opportunity afforded by future trading to the grain dealers to insure themselves against price fluctuations by the making of 'hedging' contracts."

(See also, Complaint, Para. 12, R. 32.)

Hedging also enables dealers in grain to handle larger quantities than would otherwise be feasible. This is particularly important to firms having limited financial resources. Competition is thereby stimulated, and monopoly prevented. As stated in Report of the Federal Trade Commission on The Grain Trade: "Effects of Future Trading", Vol. VII (1926) (p. 270):

> "In fact, it appears probable that without the hedging opportunity there would be much more concentration of the ownership of grain, and a greater extent of control of the grain trade by a few large concerns, than there is at present. The small man can now compete with the largest organization by reason of the hedging opportunity which makes it possible for him to operate without risking his whole capital on a single venture."

It is also stated in that report (p. 240):

> "It appears, therefore, that to remove the hedging opportunity would strengthen the tendency to integration and concentration of the grain business and related lines into the hands of a few corporations with large capital."*

---

* In the report of the Canadian Royal Grain Inquiry Commission (1923) (quoted in *Baer & Woodruff, supra*, p. 193) it is stated:

> "(1) That a futures market permits hedging and that hedging by dividing and eliminating risks in price variations reduces the spread between the prices paid to the farmer for his produce and those obtained for it upon the ultimate market.
>
> "(2) That hedging facilitates the extension of credit and thereby reduces the cost of handling grain by making it possible for grain dealers to operate on less capital than would be the case otherwise.
>
> "(3) That for the same reason hedging makes a larger degree of competition possible in the grain trade, on a given amount of capital."

C. Interference With Hedging by the Illegal Action of Respondents and the Public Detriment Caused Thereby.

Respondents, by stopping trading in, and ordering the settlement of, unmatured futures contracts, at arbitrarily fixed prices, prevented price changes in futures contracts and relieved the "shorts" of their obligation to deliver grain to the buyers. This destroyed completely the protection against price fluctuations ordinarily afforded by hedging. The "longs" were thus deprived of the right to "remove" their hedges, as and when cash grain was acquired by them to satisfy forward sales of grain or grain products, by a sale of their futures contracts at prices reflecting their true value in the course of free and unrestricted trading. At the same time, the action of respondents relieved the sellers of the obligation to deliver grain, and deprived the buyers of the right to take delivery. The value of futures contracts was thereby jeopardized, and deliveries of actual grain stopped, to the detriment of traders, such as petitioner, relying on the facilities of the Board as a source of supply.

The baneful effect of so severing the connection between futures contracts and cash grain is commented on in the Federal Trade Commission Report: "Agricultural Income Inquiry" (1937, Part I) as follows (p. 348):

> "Although the bulk of future trades are settled without actual delivery of grain, every future contract legally contemplates delivery, and this contemplated delivery is in fact the ultimate basis for the value of the future contract. Furthermore, deliveries on futures constitute the channel of connection between cash and futures and this channel should be kept in use and unobstructed. It is only by the maintenance of this connection between the cash and futures market that future trading can perform useful functions in affording facilities for hedging or in effecting claimed stabilization of prices. The Federal Trade Commission has

in the past stated that it believes that the system of future trading, in order to be sound, ought to make every practicable provision for the actual delivery and taking in of the commodity traded in, even though the contract may seldom be thus used.

"Trading in grain futures is fundamentally based upon a recognized and effectively administered grading system coupled with storage so conducted that the trader desiring to take delivery may feel confident that he will receive grain of a specified grade upon presenting the warehouse receipts tendered him. *Without such confidence on the part of holders of future contracts the connection between the cash and grain futures market is lost, the serviceability of futures for hedging is seriously impaired, and future trading degenerates into pure speculation and gambling.*" (Italics ours.)

To subject grain futures contracts to the whim and caprice of the management of contract markets will reduce trading to mere gambling as to when and on what basis settlement prices of such contracts will be fixed, and will lessen public confidence in commodity exchanges, discourage hedging and destroy the *raison d'etre* of futures trading. If gambling is thus to supersede legitimate speculation then contract markets are indeed imperiled.

As stated in Department of Agriculture, Circular 151 "Hedging in Grain Futures (June, 1931)" (p. 5):

> "*Unless he* [the hedger] *can rely upon an instantly available opportunity to either buy or sell futures in amounts to balance his cash-grain risks the futures market ceases to be for him a practical medium of protection.*"

And further (p. 19):

> "The futures market, if it is to serve fully the needs of the hedger at all times, must be a constantly available market. It must be a market where either purchases or sales can be made at any time in reasonably

large amounts without appreciable price effect. *This means that it must be a broad market, highly liquid, and free at all times from either individual or group control. It should be a market where the position of the small trader is just as secure as that of the large trader and where all may place their orders with equal confidence and equal certainty of prompt and efficient execution.*" (Italics ours.)

If the decision below, sanctioning the destruction of grain futures contracts on respondent Board and producing an intolerable situation in the grain trade, is allowed to stand, then the hedging process will be destroyed and can no longer be relied on as beneficial mechanism in our economy. Unless such a result is prevented by this Court, producers, handlers, processors and consumers will be deprived of the advantages of futures trading, and commodity exchanges will cease to serve any useful economic purpose.

The subject of commodity prices and trading on commodity exchanges dominates current economic thought. In view of the public importance of these problems the legal issues involved should now be settled by this Court, so that the rights and obligations of traders on commodity exchanges may be definitely established.

Conclusion.

It is therefore respectfully submitted that the Writ of Certiorari should be granted.

.....,

LEO F. TIERNEY,

.....,

LOUIS A. KOHN,
231 So. La Salle St.,
Chicago 4, Illinois.

Attorneys for Cargill, Incorporated, Petitioner.

DORSEY, COLMAN, BARKER, SCOTT & BARBER,
1300 First National-Soo Line Building,
Minneapolis 2, Minnesota,

MAYER, MEYER, AUSTRIAN & PLATT,
231 South La Salle Street,
Chicago 4, Illinois,
Of Counsel.

APPENDIX.

Clearing Trades on the Chicago Board of Trade.*

Trading in grain futures on the Chicago Board of Trade, a contract market by designation of the Secretary of Agriculture pursuant to the Commodity Exchange Act, is conducted through the medium of its affiliate, the Clearing Corporation, which by Rule 314 of the Board becomes substituted as a seller to the buyer and buyer to the seller upon all futures contracts. Only those who are members of the Clearing Corporation* (known as Clearing Mem-

* For an explanation of the mechanics of futures trading, see Dept. of Agriculture, Circular 151: "Hedging in Grain Futures" (June, 1931). For a description of the method of clearing transactions on respondent Board, see *Board of Trade* v. *Christie Grain and Stock Company*, 198 U. S. 236. See also, the Federal Trade Commission Report (Feb. 4, 1947), *supra*, p. 35, for the method of settling futures trades on the Board.

* The close inter-relationship between the Board and Clearing Corporation is brought out as follows in the Federal Trade Commission Report (Feb. 4, 1947), *supra* (p. 33):

> "The governing body of the Chicago Board of Trade, collectively known as its Board of Directors, consists of 21 persons constituted as follows: The President, 2 Vice-Presidents, 15 Directors, elected from among the membership of the Chicago Board of Trade, and 3 non-member directors elected by the Board of Directors.
>
> "At the time Regulation 1894 was adopted, 10 of the member-directors and 2 of the principal officers (12 in all) of the 18 members of the Board of Directors who were elected from among the membership of the Association were also firm members, officers or employees of clearing house members."

bers) can use the facilities of that Corporation to clear futures transactions.

A Clearing Member who has open "long" commitments is a buyer from the Clearing Corporation to the extent of those commitments and, conversely, a member who is "short" becomes a seller to the Clearing Corporation to the extent of his open "short" commitments. At the close of each day a Clearing Member is either net "long", net "short", or "even" with the Corporation. He must settle his transactions at the close of each day based upon his net position. On account of price fluctuations, a Clearing Member, depending upon his net position, incurs either a gain or a loss. If he has a net "long" position and the market advances, he gains. On the contrary, if he has a net "short" position and the market advances, he sustains a loss. In the former case, he is entitled to payment of his gain but, in the latter case, he sustains a loss and becomes thereby a debtor to the Corporation in the amount of said loss. In order to insure the payment of any losses which may be sustained by the Clearing Member, he is obligated to deposit cash or securities with the Corporation, as provided in the Rules and Regulations (Rules 209, 210, 310, 315 and Regulations 1822 and 1822A of the Board, also By-laws 59 to 62, inclusive, of the Clearing Corporation (R. 33-4).

All members of the Board are not Clearing Members. Only Clearing Members can use the facilities of the Clearing Corporation, and it is through Clearing Members that other members of the Board clear their trades. Only members of the Board are permitted to enter into futures contracts on the Board and they act as agents for non-members. Since Clearing Members are required to deposit margins with the Clearing Corporation to secure their obliga-

tions to it, Clearing Members, in turn, require members of the Board for whom they clear futures contracts to deposit margins with them. Likewise, members of the Board, acting for non-member customers, require such customers to deposit sufficient margins. If the trader fails to meet margin requirements, the obligation next falls upon the Board member through whom he traded, and if he fails to meet his requirements then the Clearing Corporation looks to the Clearing Member. Failure of a Clearing Member or a member of the Board to meet his responsibilities subjects him to expulsion from the Board.

The agencies investigating the situation involved in the instant case found that generally the "shorts" were small speculators widely scattered.* See, Commodity Exchange Authority Report (Aug. 12, 1946), *supra*, where it was stated (p. 2):

> "It was found that, contrary to the usual situation, speculators in wheat and corn futures as a group were net short while hedgers as a group were net long. Particularly unusual was the fact that small speculators were predominantly short."

---

* See Federal Trade Commission Report (Feb. 4, 1947), *supra*, where, in referring to earlier action of the Board of Trade, it was stated (p. 26):

> "• • • [it] undoubtedly had the effect of creating in the minds of short speculators, including both members and non-members of the Chicago Board of Trade, a feeling that they might safely sell futures at ceiling and default without danger of penalty. Commission merchants would benefit from any increased volume of trading resulting, and Clearing House members would be freed of responsibility for collecting penalties from their clients in case of default. All this undoubtedly accentuated the swing of speculative trading to the short side of the market."

And further (pp. 8-9):

> "This reversal of the usual tendency of speculators to be on the long side of the market is probably explained in part by the fact that with wheat and corn at or near ceiling levels speculators felt that any chance for profit would have to be on the short side of the market on the theory that the price could not advance beyond the ceiling."

If the market had advanced, members of the Board who were the "Commission Merchants" (brokers) with whom such "shorts" traded would have been subject to call by Clearing Members to provide additional margins and such Commission Merchants would in turn make demand upon their customers. In the event of a customer's failure to comply therewith, the Board member would then have been required to furnish such margin, and upon his failure to do so the Clearing Member would then have been responsible to the Clearing Corporation.*

---

* See, Federal Trade Commission Report (Feb. 4, 1947), *supra* (p. 35) where it was stated:

> "Under these conditions, clearing members, and other Board of Trade members responsible to clearing members, faced the necessity of finding funds to cover under-margined accounts of their customers whose under-margined accounts could not be closed out. To maintain the financial solvency of the Clearing House, clearing members would have to dip into their own funds without adequate assurance of ability to collect funds so advanced from their under-margined customers who would be reluctant, and some financially unable, to respond to calls for increased margins."

INDEX.

	PAGE
Opinions below	1
Restatement of the case	2
Summary of Argument	13
Argument	16
I The decision of the Circuit Court of Appeals in this case does not conflict with the applicable decisions of this Court, of other Federal courts, of State courts, or of Federal Administrative Tribunals.	16
A. The Respondents did not fix prices	21
B. The restraint of trade, if any, was reasonable.	23
II This case does not present important questions of Federal law which have not, but should be settled by this Court	24
Conclusion	25

TABLE OF CASES.

Cargill v. Board of Trade, CEA Docket No. 6..... 20, 24

Chicago Board of Trade v. U. S. (1918) 246 U. S. 231 .....12, 14, 18, 24

Crowley v. Commodity Exchange, Inc. (1944) 141 F. (2d) 182 .....14, 15, 18, 22, 24

Daniel v. Board of Trade (1947) (C. C. A. 7) 164 F. (2d) 815 .....14, 15, 19, 24

Garcia Sugars v. N. Y. Coffee & Sugar Exchange, Inc. (1938) 7 N. Y. S. (2d) 532..... 14, 20

Rice, et al v. Board of Trade of the City of Chicago (1947) 331 U. S. 247..... 13

Thomson v. Thomson (1925) 315 Ill. 521; 146 N. E. 451 .....11, 13, 14, 15, 19, 24

U. S. v. New York Coffee and Sugar Exchange, Inc. (1924) 263 U. S. 611.....14, 16, 17, 24

U. S. v. Socony-Vacuum Oil Co., Inc. (1940) 310 U. S. 150 ..... 18, 22

STATUTES.

Emergency Price Control Act of 1940, 50 U. S. C. A. Sec. 901 et seq..... 4

Stabilization Act of 1942, 50 U. S. C. A., Sec. 961 et seq. 4

Commodity Exchange Act, 7 U. S. C. A. 1-17a ..3, 20, 23, 24

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 671

CARGILL, INCORPORATED,
Petitioner,

vs.

THE BOARD OF TRADE OF THE CITY OF CHICAGO, et al.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

OPINIONS BELOW.

This is a suit for injunction and triple damages under the anti-trust laws. The District Court granted respondents' motion to dismiss on the ground that the Amended and Supplemental Complaint failed to state a claim upon which relief could be granted. On appeal the Circuit Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court. The opinion of the District Court (R. 49-52) is not reported. The opinion of the Circuit Court of Appeals (R. 69-72) is reported in 164 F. 2d 820.

RESTATEMENT OF THE CASE.

The petitioner, Cargill, Incorporated, by its Amended and Supplemental Complaint, challenges the validity under the anti-trust laws of certain emergency regulations which were adopted by the board of directors of the Board of Trade of the City of Chicago in May and June, 1946, pursuant to an emergency rule of that exchange (R. 28). On May 12, 1946, the Board of Trade at the request of the Federal Government, adopted an emergency regulation which provided that there be no trading in certain outstanding grain futures contracts, except for the purpose of liquidation at prices then prevailing under the old governmental price ceilings for grains (R. 35-36, 43-44). The Government had made this request in anticipation of the substantial increases in the ceiling prices for grains, which it had ordered to become effective on May 13, 1946 (R. 34-35, 43). For reasons stated below, this Regulation was rescinded (R. 44, 45) by the Board of Trade on May 31, 1946, before any change of position on the part of petitioner or any injury to it. On June 13, 1946, confronted by another emergency, the incapacity of the exchange to function as a free, open and orderly market in certain grains because of unusually large exports for world famine needs, the Board of Trade adopted an emergency regulation which closed the market to trading in these grains for delivery in 1946 and early 1947, and ordered outstanding futures contracts calling for such deliveries to be settled by monetary payments based upon closing market quotations on June 13th (R. 39, 46-47). It is these Regulations which the petitioner says violated the anti-trust laws, and upon which it bases its claim for $10,624,867.50 in damages and injunctive relief (R. 42).

Petitioner's pleading states with particularity the following facts:

Petitioner is a large dealer in grain (R. 30-31). The respondents are the Board of Trade of the City of Chicago, the Board of Trade Clearing Corporation, and their respective officers, directors and managers (R. 29-30).

On and prior to May 12, 1946, petitioner contracted to purchase in the grain market at Chicago approximately 5,000,000 bushels of grain at specified prices for delivery during the months of May, June, September and December 1946 (R. 34). Petitioner entered into these "exchange" contracts, or "futures" contracts, for the purpose of acquiring grain and to hedge its "cash grain" commitments (R. 30, 36-37, 40).

The grain market at Chicago is the largest in the world (R. 31). It is conducted as an organized exchange by the respondent, Board of Trade of the City of Chicago, and has been designated a contract market under the Commodity Exchange Act, 7 U. S. C. A., Sec. 7 (R. 31). The respondent, Board of Trade Clearing Corporation, is an affiliate of the Board of Trade and operates the "clearing house" of the exchange (R. 29, 33).

Petitioner is not a member of the Board of Trade (R. 29). Petitioner makes and "settles" its futures contracts in the grain market at Chicago through members of the Board of Trade and of the Clearing Corporation who act as agents for petitioner's brokers (R. 37, 38). Under the rules of the Board of Trade and of the Clearing Corporation, all futures contracts entered into in the grain market at Chicago, whether made for members of the Board of Trade or for non-members, are required to be "cleared" through the clearing house operated by the Clearing Corporation (R. 33).

On and prior to May 8, 1946, grain prices were subject to price ceilings established by the Office of Price Administration and the Secretary of Agriculture under applicable Federal statutes (R. 34).[1] On May 8th, the Office of Price Administration, the Office of Economic Stabilization and the Secretary of Agriculture jointly ordered a substantial increase in the maximum prices per bushel for certain grains effective Monday, May 13th—corn 25c, wheat 15c, rye 10c, barley 9c and oats 5c (R. 34-35, 43). Also on May 8th, coincident with the public announcement of this order, the three governmental agencies made request of and recommended to the governing boards of grain exchanges throughout the country that "all futures contracts open at the close of business on May 11th, be settled at the then applicable ceiling prices" (R. 43).

At the time of this governmental request and recommendation, and at all other times important herein, there was in full force and effect an "emergency rule" of the Board of Trade of the City of Chicago, Rule 251, which provides, as follows:

> "251. Emergencies. The Board[2] shall have power to declare any day to be a holiday or to close the Exchange or to stop trading in any security or in any of the future contracts of any commodity, by reason of any emergency or otherwise, and to make such Regulations in regard to deliveries and settlement prices as it may deem proper because thereof. All Exchange contracts shall be subject to the exercise of such power. Such contracts shall also be subject to the exercise by the Clearing House of the powers reserved to the Clearing House by its Charter, By-Laws, and Regulations" (R. 9).[3]

---

1 Emergency Price Control Act of 1940, 50 App. U.S.C.A. sec 901 *et seq.*, and the Stabilization Act of 1942, 50 App. U.S.C.A., sec. 961 *et seq.*

2 The "Board" mentioned in Rule 251 is the board of directors of the Board of Trade.

3 The emergency rule is stated *verbatim* in the record, page 9, and in the petition for certiorari, page 5.

On Sunday, May 12, 1946, following the request and recommendation of the governmental agencies, the board of directors of the Board of Trade adopted Regulation 1894 (R. 35-36, 43). This Regulation was an interim measure (R. 43). It stated that the board of directors desired to comply "so far as possible" with the request of the Government for settling outstanding futures contracts (R. 43). The regulation ordered, in substance and effect, that "until further notice", all trading in grain futures contracts outstanding on the Chicago exchange on May 11, 1946, be stopped, except trading "for the purpose of liquidation"[4] at or below the old ceiling prices in effect on May 11th; that in the event it thereafter should become necessary for the board of directors to assess penalties against the sellers on these futures contracts for their failure to deliver these grains, the board in making such assessments would give no consideration to the May 13th increase in the governmental price ceilings for grains; that on and after May 14, 1946, futures trading on the Chicago exchange would be permitted in grains for delivery in specified *new* delivery months, during 1946 and 1947, at prices under the *new* governmental price ceilings for grains (R. 36, 43).

Regulation 1894 became operative on May 13, 1946 (R. 36). Between May 12 and May 31, 1946, the respondent directors of the Board of Trade requested the Office of Price Administration, the Office of Economic Stabilization, and the United States Department of Agriculture to issue a directive which would order the grain exchanges to carry out the governmental policy which had been expressed by the Board of Trade in Regulation 1894.[5] The governmental agencies found that they could not issue such

[4] Exchange contracts made by members for themselves or for nonmember principals may be liquidated by the setting off of purchases against sales upon clearance. Rules 310, 315 of the Board (R 33, 34).

[5] See petition for certiorari, p. 4, footnote, and R. 45.

a directive and refused to do so (R. 45).[6] During this same period, the Clearing Corporation received notification of impending defaults by sellers on outstanding futures contracts calling for the delivery of corn, oats and barley in May 1946[7] (R. 44).

On May 31, 1946, the board of directors of the Board of Trade adopted Regulations 1897 and 1898 under the emergency rule (R. 37, 44, 45). Regulation 1897 adverted to the emergency which had arisen by reason of the sellers' defaults on the May futures contracts, and ordered, in substance and effect, that the defaults be settled by monetary payments by the contract sellers, through the Clearing Corporation, to the contract purchasers, based upon the prevailing prices under the *new* maximum prices established by the Government on May 13th (R. 37, 44). Thus Regulation 1897 repealed that part of Regulation 1894 in which the board of directors had announced that until further notice it would give no consideration to the May 13th increase in governmental price ceilings in assessing penalties for defaults against contract sellers (R. 36, 43).

In Regulation 1898, the board of directors stated that it had adopted Regulation 1894 pursuant to the request and recommendation made to all grain exchanges on May 8th by the three governmental agencies; that the board of directors had asked these agencies to issue a directive embodying the governmental policy carried out by Regulation 1894, but that these agencies had indicated they could not do so; and that the board had reconsidered its interim action expressed in Regulation 1894 (R. 45). Regulation 1898

---

[6] See petition for certiorari, p. 4, footnote, and R. 45.

[7] Rule 284 of the Board of Trade provides that delivery of grain on a futures contract must be made on the last business day of the delivery month, if not previously delivered (R. 33-34). The May defaults were the first defaults by sellers on futures contracts after the adoption of Regulation 1894.

ordered that Regulation 1894 be repealed, that trading on the Chicago Exchange in all futures contracts should continue for all purposes without limitation in any case to trading for the purpose of liquidation, and that all trading in grains in the grain market at Chicago would be at prices under the *new* governmental price ceilings (R. 37, 45).

The petitioner does not allege or claim that it changed its position in the market in the period intervening between the adoption and the repeal of Regulation 1894. To the extent that the contract sellers on some of its futures contracts defaulted in their May deliveries, petitioner was entitled by virtue of Regulation 1897 to receive from the defaulters through the Clearing Corporation, petitioner's agents and brokers, a monetary settlement based on the *new* maximum prices established on May 13th and in effect on May 31, 1946 (R. 37).

On June 4, 1936, the Clearing Corporation notified all "clearing members" of the Board of Trade that because of the institution of legal action in the courts challenging the validity of Regulations 1897 and 1898,[8] all moneys paid over to them under the provisions of these regulations were to be returned in the event either or both of the Regulations ultimately were held invalid by the courts (R. 38). In consequence, the members of the Clearing Corporation who acted as agents for petitioner's brokers in carrying out petitioner's futures transactions on the exchange either failed to pay over to petitioner the moneys payable under Regulations 1897 and 1898, or paid over such moneys to

---

[8] The legal action in question had no reference to the instant suit, but to an action brought by the "shorts," or contract sellers against the Board of Trade in the United States District Court for the Northern District of Illinois, case No. 46-C-1059 entitled *"Robert W. Buckley*, plaintiff, v. *Board of Trade of the City of Chicago, et al*, defendants." The petitioner does not attack Regulations 1897 and 1898, but relies on them.

petitioner subject to the provisions of the notice of June 4th (R. 38, 25-26).[9]

On June 13, 1946, the board of directors of the Board of Trade took action under Rule 251 with respect to a matter unrelated to the change in ceiling prices dealt with in Regulations 1894, 1897 and 1898. Regulation 1899, adopted by the board of directors on that date, described this emergency as follows (R. 46):

> "Whereas there exists an acute and critical world food shortage which it is anticipated will continue throughout 1946 and will necessitate the continued export from the United States of whole grains and grain products in unusually large quantities; and
>
> Whereas the purchase and allocation of various grains by the United States under its programs for world famine relief has already diverted and will continue to divert from domestic trade channels large quantities of grains that otherwise would be available for millers and other processors and for the performance of grain futures contracts on this Exchange; and
>
> Whereas in consequence of the foregoing and in view of present crop and statistical data considered in connection with reported grain stocks and added demands of governmental agencies, the supply of wheat, corn, barley, and rye for domestic use and consumption will be so inadequate as to:
>
> (1) render impossible the continuance on this Exchange of a free, open and orderly market where normal competitive elements can and may operate, with respect to futures contracts calling for delivery of

[9] The Amended and Supplemental Complaint alleges not only that the members of the Clearing Corporation, but the Clearing Corporation, failed to pay these sums, etc. (R. 38). The notice of June 4, 1946, did not terminate the making of payments through the Clearing Corporation under Regulations 1897 and 1898, but merely notified clearing members that the payments made through the Clearing Corporation were subject to return to the Clearing Corporation in the event Regulations 1897 and 1898 were held invalid. The affidavit of Austen S. Cargill filed by petitioner herein and included as part of the record states that it was the members of the Clearing Corporation who were the agents of petitioner's brokers that were withholding from the petitioner the moneys paid by the defaulters through the Clearing Corporation or that were paying over such moneys to petitioner subject to the June 4th notice (R. 25-26).

wheat in July, August, September, November, and December, 1946, and in March and May, 1947, for delivery of corn in July and September, 1946, for delivery of barley in July and September, 1946, and for delivery of rye in July, September, November, and December, 1946, and in March, 1947;

(2) prevent the performance and fulfillment of such futures contracts by delivery of requisite quantities of such grains; and

(3) enable purchasers under such futures contracts, in event of the raising or removal of governmental price ceilings, to require liquidation of such futures contracts at exorbitant and extortionate prices, and

Whereas the action hereinafter ordered is required in the national public interest, and

Whereas an emergency exists, within the meaning of Rule 251,

Therefore, the Board of Directors, having found the matters set forth in the above recitals to be true, acting under the provisions of Rule 251, orders: * * *"

Regulation 1899 then ordered that all futures trading be stopped forthwith in wheat, corn, rye and barley, for delivery during 1946 and early 1947, except barley for delivery in November and December 1946 and corn and rye for delivery in early 1947 (R. 39, 47). Futures contracts outstanding at the close of trading on the exchange on June 13, 1946, and calling for such deliveries were ordered to be settled without delivery and by the payment through the Clearing Corporation of settlement prices, "which [settlement prices] shall be the closing price quotations of each of said futures on this Exchange on this day" (R. 39, 47). Regulation 1899 directed the Clearing Corporation and all members of the Board of Trade to carry out the settlement thus ordered (R. 39, 47).

As a result of the adoption and enforcement of Regulation 1899, such of petitioner's futures contracts as were within the scope of the Regulation were terminated and settled by monetary payments in accordance therewith (R. 40). Petitioner was compelled later to purchase "cash grain" wherever such grain could be found, at prices in excess of those provided in its terminated contracts (R. 40).

On June 30, 1946, the imposition under Federal statutes of maximum prices for grain, was ended, and thereafter prices for "cash grain" in the country rose substantially (R. 40). Had Regulation 1899 not been adopted, the value of petitioner's futures contracts which were terminated thereunder would have appreciated over their value on June 13th when the governmental price ceiling was in force (R. 40-41). The petitioner alleges that by reason of Regulation 1899, it sustained damages in the amount of $2,851,225 (R. 41).

The Amended and Supplemental Complaint charges that the Board of Trade of the City of Chicago, its officers and directors, and the Board of Trade Clearing Corporation, and its officers and managers, following the request and recommendation of the governmental agencies on May 8, 1946, combined and conspired in violation of the Sherman Act, 15 U. S. C., Sec. 1, "to prevent the prices of futures contracts calling for the delivery of grain * * * from reflecting the general value of such grains", "to control and fix the prices of futures contracts" and "to limit and restrict trading in grain futures contracts," for the purpose of protecting from loss contract sellers in the grain market at Chicago (R .35). The adoption by the board of directors of the Board on May 12, 1946 of Regulation 1894, the giving of notice by the Clearing Corporation on June 4, 1946 to clearing members of the Board of Trade relative to payments of moneys under Regulations 1897 and 1898,

and the adoption by the board of directors of the Board of Trade on June 13, 1946 of Regulation 1899, are alleged to constitute the parts of the charged combination and conspiracy (R. 35, 37, 39). The petitioner prays that it be awarded injunctive relief and damages in the amount of $10,624,867.50 on account of the alleged violation of the anti-trust laws (R. 41-32).

On motion of the respondents, the District Court below dismissed the cause for failure of the Amended and Supplemental Complaint to state a claim under the anti-trust laws (R. 47, 49). In the Circuit Court of Appeals, the judgment of the District Court was affirmed by a unanimous court (R. 74, 69). It held that the actions taken by the respondents under the emergency rule did not violate the anti-trust laws, but "rather than being in restraint of commerce, were in aid of commerce in facilitating future trading on the market" (R. 73). It declared that "these regulations were valid and binding upon members of the contract market. They are likewise binding upon one who, like the plaintiff, is not a member but trades on the market through members. *W. A. Thomson* v. *Alexander W. Thomson et al.*, 315 Ill. 521, 530, 146 N. E. 451, 455" (R. 72).

It rejected the charge of petitioner that the regulations amounted to "price-fixing" and were in restraint of trade. The Circuit Court of Appeals, in commenting upon the charge of price-fixing, said:

> "* * * This was not price fixing. It was the establishment of a measure of damages for the liquidation of the contracts terminated and in which there was to be no further trading. Thereafter, these contracts were not in the market for anything but settlement or liquidation upon the terms set forth in the regulations. There was no trading in these contracts at the liquidation figure, but a clearing of the way for trading. Here we have the settlement or liquidation of con-

> tracts which the parties by their duly authorized agents have terminated. The settlement is upon terms that the parties through their agents have agreed upon. Such termination and settlement is not price-fixing any more than any termination and settlement of contractual obligations by mutual agreement of the parties is price-fixing. No other trading on the market was affected by the settlement of these contracts."

and as to the contention that the action restrained trade, said:

> "Neither is the termination and settlement an illegal restraint of commerce. Almost every act of an agency such as the Board and Clearing affects or restrains commerce in some respect, but such restraints as may be within the rule of reason are not unlawful. *Board of Trade of the City of Chicago et al.* v. *United States,* 246 U. S. 231, 38 S. Ct. 242, 62 L. Ed. 683. The acts of the defendants rather than being in restraint of commerce, were in aid of commerce in facilitating future trading on the market. Only the bad faith of the defendants in the discharge of their duties under the emergency in which they purported to act can vitiate the defendants' action. No such claim of bad faith is made in this case."

SUMMARY OF ARGUMENT.

This case does not involve a combination or conspiracy by substantial business interests to restrain trade and competition by price-fixing or other means, or an effort by a person or persons to create a monopoly or substantial economic control over a trade or business in interstate commerce. This case deals with the conduct in two emergencies of a grain exchange, the responsibility for the functioning of which rests under state charter and federal statute upon the respondent Board of Trade and its governing board. *Thomson* v. *Thomson* (1925), 315 Ill. 521, 530, 146 N. E. 451, 455; *Rice* v. *Chicago Board of Trade* (1947), 331 U. S. 247, 250; 7 U. S. C., Sec. 7 (c) to (f).

The emergency regulations of the Board of Trade here assailed as violative of the anti-trust laws relate to two separate matters. In Regulation 1894, temporary recognition was accorded, following request of the Federal Government, to an announced governmental policy which sought to prevent the accrual of profits from a government-ordered increase in the established maximum prices for grains. Upon the failure of the Government to impart to its policy the force of law, and before any loss was sustained by petitioner, this Regulation was repealed. In Regulation 1899, trading on the exchange in certain grains for delivery in 1946 and early 1947 was stopped, and existing exchange contracts for such deliveries were ordered settled without delivery, because of a world food crisis which had incapacitated the exchange from continuing as a free, open and orderly market in these grains.

Thus considered, Regulations 1894 and 1899 were not violative of Section 1 of the Sherman Act. 15 U. S. C., Sec. 1. Neither their design nor their effect was to impose an unreasonable restraint upon trade in grain, or to fix the prices of grain sold in interstate commerce. Both regulations were exercises of that inherent power to close trading and provide a means for settling existing exchange contracts, vested by necessity in all commodity exchanges as a means for dealing with an emergency. *Thomson* v. *Thomson* (1925), 315 Ill. 521, 146 N. E. 451; *Crowley* v. *Commodity Exchange* (1944), 141 F. 2d 182, 185 (C. C. A. 2); *Daniel* v. *Board of Trade* (1947), 164 F. 2d 815, 819 (C. C. A. 7); *Garcia Sugars Corp.* v. *New York Coffee & Sugar Exchange, Inc.* (1938), 7 N. Y. S. 2d 532, 534 aff'd w.o.op. sub nom. *Rifkind* v. *New York Coffee & Sugar Exchange, Inc.*, 258 App. Div. 871, 16 N. Y. S. 2d 1023.

No illegal burden or restraint under the statute is imposed upon interstate commerce by the operation of rules and regulations reasonably directed to the promotion and operation of a commodity exchange. *United States* v. *New York Coffee & Sugar Exchange, Inc.* (1924), 263 U. S. 611, 619, 621; *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238. *A fortiori* is this true where the regulation under attack is aimed at resolving a national emergency affecting the market. The usefulness and legality of commodity futures exchanges where business can be carried on under well-defined limitations and rules, long have been recognized by the judicial and legislative branches of the Government. *United States* v. *New York Coffee & Sugar Exchange, Inc.*, 263 U. S. 611, 619; 7 U. S. C., Sec. 1 *et seq.*

That part of Regulations 1894 and 1899 which provided for the liquidation or termination of existing exchange contracts at prevailing ceiling or market prices, did not con-

stitute "price-fixing". The prices of grains to be purchased and sold on the exchange was not fixed, nor were factors determinant of such prices eliminated. The prices contained in the existing exchange contracts which were the subject of these Regulations, were determined openly and competitively on the floor of the exchange. These Regulations merely provided measures for the settlement of existing futures contracts, the liquidation or termination of which was required in the public interest. *Thomson* v. *Thomson* (1925), 315 Ill. 521, 146 N. E. 451; *Crowley* v. *Commodity Exchange* (1944), 141 F. 2d 182, 185 (C. C. A. 2); *Daniel* v. *Board of Trade* (1947), 164 F. 2d 815, 819 (C. C. A. 7). Petitioner's contracts were subject to all rules and regulations of the exchange, including the emergency rule and regulations adopted thereunder. (*Ibid.*) The alleged loss sustained by petitioner as a result of the measures for settlement thus provided was an eventuation of an assumed risk. (*Ibid.*)

ARGUMENT.

The petition for certiorari fails to show any grounds for the granting of the writ. The decision of the Circuit Court of Appeals in this case is not in conflict with any applicable decisions of the Supreme Court or of any Circuit Court of Appeals. In fact, the decision is fully in accord with the decisions of the Supreme Court, of the other Circuit Courts of Appeals and of governmental administrative agencies. There is involved no unsettled principle of law of wide general application. Within the limited scope of this controversy, the decision is sustained by legal precedent. The case presents no important question which has not been but should be settled by this Court.

I.

The Decision of the Circuit Court of Appeals in this Case does not Conflict with the Applicable Decisions of this Court, of other Federal Courts, of State Courts, or of Federal Administrative Tribunals.

The decision of the Circuit Court of Appeals upholding Regulations 1894 and 1899 of the Board, (R. 69-74) followed the applicable decisions of this Court, other Circuit Courts of Appeals, state courts and government administrative agencies recognizing and approving rules and regulations which have placed restrictions and limitations on futures trading.

Thus, in *United States* v. *New York Coffee & Sugar Exchange, Inc.*, 263 U. S. 611, the Court, in an opinion by Chief Justice Taft, upheld against attack under the anti-

trust laws, the rules and regulations of the New York Coffee and Sugar Exchange which permitted the liquidation of exchange contracts without delivery and by the setting off of purchases against sales through clearance by the affiliated Sugar Clearing Association. (Transcript of Record, p. 71, *U. S.* v. *New York Coffee and Sugar Exchange,* U. S. Supreme Court No. 331, October Term, 1923). The Court there said (263 U. S., pp. 619, 621):

> "* * * the rules and organization of the Exchange and Clearing Association are very like those of the Chicago Board of Trade and similar Exchanges for the sales of commodities for future delivery."
>
> * * *
>
> "The usefulness and legality of sales for future delivery and of furnishing an Exchange where under well-defined limitations and rules the business can be carried on, have been fully recognized by this Court in *Board of Trade* v. *Christie Grain & Stock Co.,* 198 U. S. 236, 246. * * * The machinery of such an exchange has been at times made the means of promoting corners in the commodity dealt in by such manipulators and speculators, thereby restraining and obstructing foreign and interstate commerce. In such instances, the manipulators subject themselves to prosecution and indictment under the Anti-Trust Act. *United States* v. *Patten,* 226 U. S. 525. But this is not to hold that such an Exchange with the facilities it affords for making contracts for future deliveries is itself a combination and conspiracy thus to restrain interstate and foreign trade."
>
> * * *
>
> "The Government contends that the prayer of the petition is justified by the decision of this Court in the case of *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1. * * * But nothing in the case sustains the view that those promoting and operating such an Exchange are themselves imposing a burden or restraint upon interstate commerce for which they may be indicted under the Anti-Trust Act, or from continuing which they may be enjoined."

And, in *Chicago Board of Trade* v. *U. S.* (1928), 246 U. S. 231, this court held that the "Call Rule" of the Board of Trade which limited the time and the price of offers for cash grain by members of the Board of Trade was not a violation of the anti-trust laws.

In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 217, this Court in discussing with approval its decision in *Chicago Board of Trade* v. *United States, supra*, 246 U. S. 231, stated, among other things:

> "And among its effects ["Call" rule] was the creation of a public market for grains under that special contract class, where prices were determined competitively and openly."

Circuit Courts of Appeals have recognized upon common law principles, the general power to close trading and provide a means for settling existing exchange contracts in an emergency vested by necessity and convention in all commodity exchanges as a means for dealing with an emergency of this sort. In *Crowley* v. *Commodity Exchange* (1944), 141 F. 2d 182, 185, the Circuit Court of Appeals for the Second Circuit in sustaining the exercise of such power, said:

> "* * * There is no doubt of the general power of the Board of Governors of the Exchange to compel members and their customers to cease trading and accept a reasonable settlement of their contracts. In *Thomson* v. *Thomson*, 315 Ill. 521, 146 N. E. 451, the Illinois Supreme Court held that a rule of the Chicago Board of Trade conferring upon its Board of Directors the power to regulate 'the use of the Exchange rooms' was sufficient authority for the Board to suspend trading in corn futures after the entry of the United States into World War I and order the settlement of all open contracts at a reasonable price. This doctrine was expressly affirmed in *Garcia Sugars Corp.* v. *New York Coffee & Sugar Exchange, Inc.*, Sup., 7 N.Y.S. (2d) 532, affirmed w. o. op. sub. nom. *Rifkind* v. *New York*

Coffee & Sugar Exchange, Inc., 258 App. Div. 871, 16 N.Y.S. (2d) 1023, regarding a suspension of sugar trading due to the operation of the Jones-Costigan Quota Law. In the present case, § 103 of the By-Laws grants to the Board of Governors control over the Exchange rooms and power to 'adopt such rules and regulations as it may deem advisable for carrying out the objects of the Exchange'; and § 408 gives the Board power with or without notice to close the Exchange for trading or all business or to suspend trading, 'as may, in its judgment, serve to promote the best interests of the Exchange or of the public.' Hence the resolution of July 28 ordering the suspension of trading was undoubtedly valid."

"Under the authorities cited, the general corporate authority of the Governors would also sanction the liquidation procedure; * * *."

In *Daniel* v. *Board of Trade* (1947), 164 F. 2d 815, 819, the Circuit Court of Appeals for the Seventh Circuit said:

"* * * Acting under Rule 251 [emergency rule] which was binding upon the plaintiffs, the Board had a right to stop trading in the plaintiffs' futures and to liquidate them, as it did."

In the face of these decisions sustaining the general powers of exchanges to stop trading in an emergency and to provide a means for settling or liquidating existing exchange contracts, it indeed would be anomalous for it now to be held that the exercise of such powers duly invoked, violated the Federal anti-trust laws. The existence of such powers long ago was recognized in the state courts. In *Thomson* v. *Thomson* (1925), 315 Ill. 521, 146 N. E. 451, the plaintiff had contracted to purchase on the Chicago exchange a quantity of corn for delivery in July 1917. War broke out with Germany, and an abnormal demand for grain developed in this country. The Board of Trade adopted a regulation stopping trading in July corn as of the close of July 5, 1917, and ordering that existing contracts calling

for the delivery of such corn be settled without delivery at market prices on July 5, 1917. Between July 5 and July 31, 1917, when delivery was due, prices of corn rose 75¢ per bushel. The Supreme Court of Illinois held that all traders were bound by the emergency regulation. See, also, *Garcia Sugars Corp.* v. *New York Coffee & Sugar Ex-Change, Inc.* (1938), 7 N. Y. S. 2d 532, 534, aff'd w.o. op. 258 App. Div. 871, 16 N. Y. S. 2d 1023.

Consistently, in *Cargill* v. *Board of Trade of the City of Chicago,* CEA Docket No. 6,[10] the Commodity Exchange Commission, comprised of the Secretaries of Agriculture and Commerce and the Attorney General, sustained as a proper discharge of duties imposed upon the governing board of the Board of Trade by Section 5(d) of the Commodity Exchange Act, 7 U. S. C., Sec. 7(d), the adoption of an emergency regulation stopping trading in September 1937 corn futures and ordering all then existing contracts in that future to be terminated without delivery upon a monetary basis. The Business Conduct Committee of the Board of Trade had found that Cargill was attempting to run a corner in September 1937 corn futures, and ordered Cargill to take remedial steps. Cargill refused to do so, and the emergency regulation was adopted. Cargill then filed a complaint with the Commission charging that the action of the Board in adopting the regulation violated the Commodity Exchange Act. The Commission rejected this contention, and held that the action taken in the emergency by the Board was not a burden upon interstate commerce, but in aid of that commerce and the policy of the Act.

---

[10] A copy of the findings and decision in this case duly certified by the Department of Agriculture has been lodged with the Clerk of this Court.

A. The Respondents did not fix prices.

The petition for certiorari advances the contention that Regulations 1894 and 1899 constituted "price-fixing", because of those provisions thereof which ordered the liquidation or termination of existing exchange contracts to be at prices prevailing when trading was stopped under the Regulations (Pet., p. 10). The petition states that but for the adoption of these Regulations, "the prices of such contracts would have varied from day to day and from minute to minute", and, accordingly, these Regulations fixed prices (Pet., p. 10).

That part of Regulations 1894 and 1899 which provided for the liquidation or termination of existing exchange contracts at prevailing ceiling or market prices, did not constitute "price-fixing". The price of grain to be purchased and sold on that exchange was not fixed, nor were factors determinant of such price eliminated. The price contained in the exchange contracts which were the subject of these Regulations, had been determined openly and competitively on the floor of the exchange. The price to be reached in exchange contracts not coming under these Regulations similarly would be determined openly and competitively. These Regulations merely provided measures for the settlement of existing exchange contracts, the liquidation or termination of which was incident to and required by the resolution of a market emergency.

This case involves nothing more than the termination or liquidation of certain contracts and the settlement of liabilities thereon in the manner agreed to by the parties themselves, as an incident to the stopping of trading in certain grains in an emergency. There was obviously no tampering with any price structure and no attempt to fix

or alter in any way the price at which trading either for cash or future delivery might be carried on thereafter.

All future contracts on the Board of Trade contemplate delivery. But they also contemplate the exercise of the power to stop trading in an emergency and to order the contracts settled on a monetary basis without delivery. Both parties to every futures contract so agree. In *Crowley* v. *Commodity Exchange* (1944), 141 F. 2d 182, the court, in upholding the right of that exchange to stop trading in and order a settlement of silk futures contracts on a monetary basis, said at page 189:

> "• • • While it is true that the By-Laws of the Exchange intended delivery under the contracts, one of the necessary terms of each contract was that it could be settled and liquidated by the Board of Governors in such contingencies as are contemplated by § 409. This follows from the provision which states, 'This contract is made in view of, and in all respects subject to the By-Laws of the Exchange. There hence were alternative methods of performance; and it is well settled that when a contract provides for one of two alternatives, impossibility of performance of one alternative does not excuse the promisor from performing the other. *Yankton Sioux Tribe* v. *United States*, 272 U. S. 351, 47 S. Ct. 142, 71 L. Ed. 294; 6 Williston on Contracts, Rev. Ed. 1938, § 1961."

The case of *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, relied upon by petitioner, is readily distinguishable. In that case, the activity condemned as price-fixing consisted of a combination among like business interests to raise the price of a commodity *to be sold* in a market, by removal from the market of certain factors having an adverse competitive effect upon such price. Here, Regulations 1894 and 1899 were not aimed at and had no effect upon the prices of grain contracted to be purchased or sold in the open delivery months. They dealt

with contracts already made, the liquidation or termination of which was ordered to be settled by a monetary payment referable to existing ceiling or market prices. The basis of settlement was incidental to and a necessary result of the closing of trading in certain futures. It was, in effect, merely the decision of an arbitrator (i. e., the governing board) authorized by the contracting parties to determine a basis for settlement of their rights in the event of an emergency.

B. The Restraint of Trade, if any, was Reasonable.

It is apparent from the foregoing discussion that Regulations 1894 and 1899 did not impose unreasonable restraints upon trade in grain. As already stated, both Regulations were exercises of that inherent power to close trading and provide a means for settling existing exchange contracts, vested by necessity in all commodity exchanges as a means for dealing with an emergency directly affecting their operations. In Regulation 1894, recognition was given temporarily upon request of the Government to a declared governmental policy, but such recognition was withdrawn without injury to petitioner following the failure of the Government to impart to its policy the force of law. The governmental request was made in the aftermath of the War and in the midst of conditions of emergency.

The respondents, when they adopted Regulation 1899, had determined that a proper market no longer existed in the specified futures and that deliveries were "impossible" (within the standards envisaged by the Commodity Exchange Act). It then became their duty to close those futures. The governing board of a contract market must, of necessity, have the power and authority to limit trading and in great emergency to close a future when conditions

become such that a proper market no longer exists. If the power to close or to restrict futures trading in an emergency were lacking, the governing board of a contract market would be powerless to prevent price manipulation, cornering of the market, and other evils sought to be prevented by the Commodity Exchange Act.

The adoption and enforcement of both Regulations, fall directly within the holding in *Chicago Board of Trade* v. *U. S.* (1918), 246 U. S. 231, which applied the "rule of reason" to the restraint involved.

II.

This Case does not Present Important Questions of Federal Law which have not, but should be, Settled by This Court.

This case involves only the inherent right of a commodity exchange to close futures trading and order contracts therein settled when conditions similar to those involved herein are found to exist.

The necessity for and the validity of the use of this power under such conditions has been universally recognized and approved. *Crowley* v. *Commodity Exchange* (1944), (CCA 2), 141 F(2d), 182; *Daniel et al.* v. *Board of Trade* (1947), 164 F. 2d 815; *Thomson* v. *Thomson* (1925), 315 Ill. 521, 146 N. E. 451; *Cargill Inc.* v. *Board of Trade of the City of Chicago* (1940), CEA Docket No. 6. The rules and regulations of a commodity exchange authorizing its governing board to take such action, do not violate the anti-trust laws. *Chicago Board of Trade* v. *U. S.* (1918), 246 U. S. 231; *United States* v. *New York Coffee and Sugar Exchange* (1924), 263 U. S. 611.

Conclusion.

The judgment of the District Court below and its affirmance by the Circuit Court of Appeals were fully in accord with the principles laid down by this Court, and were in harmony with the decisions of federal and state courts and of the Commodity Exchange Commission.

Since the facts upon which the petitioner bases its claim under the anti-trust laws are pled with particularity in its Amended and Supplemental Complaint, and such facts disclose affirmatively the non-existence of any right under those laws, the cause was adjudicated properly below on the pleadings.

We respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

WEYMOUTH KIRKLAND,
HOWARD ELLIS,
WILLIAM H. SYMMES,
ANDREW C. HAMILTON,
BENNITT E. BATES,
Attorneys for respondents Board of Trade of the City of Chicago, Board of Trade Clearing Corporation, and certain other respondents,
Chicago 2, Ill. RAN 2929
33 N. La Salle St.

WALTER BACHRACH,
WALTER H. MOSES,
STANLEY MORRIS,
Attorneys for respondents Frank A. Miller and Emmet G. Barker,
231 S. La Salle St.
Chicago 4, Ill. STA 6862

FLOYD E. THOMPSON,
FREDERICK MAYER,
ABRAHAM L. RITTENBERG,
Attorneys for Respondent J. O. McClintock,
11 S. La Salle St.
Chicago 3, Ill. RAN 0220

FILE COPY

Office - Supreme Court, U. S.
MAY 10 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1947

No. 671

CARGILL, INCORPORATED,

Petitioner,

vs.

THE BOARD OF TRADE OF THE CITY OF CHICAGO, ET AL.,

Respondents.

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LEO F. TIERNEY

LOUIS A. KOHN
Attorneys for Cargill, Inc., Petitioner
231 So. La Salle St.
Chicago (4), Ill.

DORSEY, COLMAN, BARKER, SCOTT & BARBER
Minneapolis, Minn.

MAYER, MEYER, AUSTRIAN & PLATT
Chicago, Ill.
of Counsel

R. R. DONNELLEY & SONS CO., CHICAGO

INDEX

		Page
I	The Decision of the Circuit Court of Appeals Dismissing the Amended Complaint and Depriving Petitioner of the Opportunity to Prove the Allegations Thereof is Contrary to the Decisions of This Court and of the Various Circuit Courts of Appeals, and Departs from the Established Practice under the Federal Rules of Civil Procedure.....	2
II	The Far Reaching Consequences of the Decision Below upon the Economy of the Nation Necessitate the Determination by This Court of the Vital Questions in Issue.....	7

APPENDIX

PAGE

Excerpts from Rules and Regulations of Various Exchanges 11–26

I COMMODITY EXCHANGES 11–24
- The Board of Trade of Kansas City, Mo 11
- Minneapolis Grain Exchange 12
- Milwaukee Grain Exchange 13
- Merchants' Exchange of St. Louis 14
- Duluth Board of Trade 15
- New York Cotton Exchange 16
- Chicago Mercantile Exchange 17
- New York Mercantile Exchange 19
- Wool Associates of the New York Cotton Exchange, Inc 19
- Memphis Merchants Exchange Clearing Association 19
- New Orleans Cotton Exchange 20
- New York Produce Exchange 20
- New York Coffee and Sugar Exchange, Inc 20
- New York Cocoa Exchange, Inc 21
- Commodity Exchange, Inc. (New York) 23

II STOCK EXCHANGES 25–26
- New York Stock Exchange 25
- Chicago Stock Exchange 25

TABLE OF CASES

	Page
Aikens v. *Wisconsin*, 195 U.S. 194 (1904)	6
American Tobacco Co. v. *United States*, 328 U.S. 781, 809 (1946), affirming 147 F.2d 93 (C.C.A. 6, 1944)	6
Ballard Oil Terminal Corporation v. *Mexican Petroleum Corporation*, 28 F.2d 91 (C.C.A. 1, 1928)	5
Borden's Co. v. *Baldwin*, 283 U.S. 194 (1934)	4
Camrel Co., Inc. v. *Skouras Theatres Corporation*, 8 Fed. Rules Service, 8a25, Case 4 (D.C.N.J., 1944)	5
Carroll v. *Morrison Hotel Corporation*, 149 F.2d 404 (C.C. A. 7, 1945)	3, 4
Cohen v. *United States*, 129 F.2d 733 (C. C. A. 8, 1942)	4
Continental Collieries, Inc. v. *Shober*, 130 F.2d 631 (C. C. A. 3, 1942)	3, 4
Dennis v. *Village on Tonka Bay*, 151 F.2d 411 (C. C. A. 8, 1945)	4
Dioguardi v. *Durning*, 139 F.2d 774 (C. C. A. 2, 1944)	4
Fargo Glass & Paint Co. v. *Globe American Corporation*, 161 F.2d 811 (C. C. A. 7. 1947)	4
Galbreath v. *Metropolitan Trust Co.*, 134 F.2d 569 (C. C. A. 10, 1943)	3
Garbutt v. *Blanding Mines Co.*, 141 F.2d 679 (C. C. A. 10, 1944)	4
Hicks v. *Bekins Moving & Storage Co.*, 87 F.2d 583 (C. C. A. 9, 1937)	5
Kohler v. *Jacobs*, 138 F.2d 440 (C. C. A. 5, 1943)	4

TABLE OF CASES (Continued)

Page

Leimer v. *State Mutual Life Assurance Co.*, 108 F.2d 302 (C. C. A. 8, 1940) 4

Louisiana Farmers' Protective Union v. *Great Atlantic & Pacific Tea Company*, 131 F.2d 419 (C. C. A. 8, 1942) .. 4

Lynch v. *Magnavox Co.*, 94 F.2d 883,891 (C. C. A. 9, 1938) 6

Maken Amusement Corporation v. *Trenton-New Brunswick Theatres Co.*, 3 F. R. D. 429 (D. C. N. J. 1944) 5

Mitchell Woodbury Corporation v. *Albert Pick Barth Co.*, 41 F.2d 148 (C. C. A. 1, 1930) 5

Myers v. *Bethlehem Ship Building Corporation*, 303 U. S. 41 (1938) 6

Package Closure Corporation v. *Seal Right Co.*, 141 F.2d 972 (C. C. A. 2, 1944) 4

Polk Company v. *Glover*, 305 U. S. 5 (1938) 4

Rivoli Operating Corporation v. *Loew's, Inc.*, 7 F. R. D. 219 (D. C. N. Y. 1947) 5

Sparks v. *England*, 113 F.2d 579 (C. C. A. 8, 1940) 4

Stevens, C. E., Co. v. *Foster & Kleiser Co.*, 311 U. S. 255 .. 5

Stewart-Warner Corporation v. *Staley*, 42 F.Supp. 140 (D. C. Pa. 1941) 5

Swift & Company v. *United States*, 196 U. S. 375 (1905) .. 6

Tahir Erk v. *Glenn L. Martin Co.*, 116 F.2d 865 (C. C. A. 4, 1941) 4

U. S. v. *Association of American Railroads*, 4 F. R. D. 510 (D. C. Neb. 1945) 4

TABLE OF CASES (Continued)

	Page
U. S. v. *Johns-Manville*, 67 F.Supp. 291 (D. C. Ill. 1941).	5
U. S. v. *New York Coffee & Sugar Exchange*, 263 U. S. 611 (1924)	7
U. S. v. *Patten*, 226 U. S. 525 (1913)	6
U. S. v. *Reading Co.*, 226 U. S. 324 (1912)	6
U. S. v. *Standard Oil Company of California*, 7 F. R. D. 338 (D. C. Cal. 1947)	5
Wm. F. Luebke Co. v. *Manhardt*, 37 F. Supp. 13 (D. C. Wis. 1941)	5

MISCELLANEOUS

Federal Rules of Civil Procedure:	
8(a)	3
8(e)	3
8(f)	3
12(b)(6)	3
Federal Trade Commission Report: "Economic Effects of Grain Exchange Actions, Affecting Futures Trading During the First Six Months of 1946 (Feb. 4, 1947)"	8
Hearings Before the House Committee on Agriculture, 80th Congress, 1st Sess. "Long-Range Agricultural Policy" (Part 4) (1947), pp. 578, 581, 582	8
U. S. Department of Agriculture, Report of the Administrator of the Commodity Exchange Authority (1947), p. 7	7

IN THE

Supreme Court of the United States

OCTOBER TERM 1947

No. 671

CARGILL, INCORPORATED,

Petitioner,

vs.

THE BOARD OF TRADE OF THE CITY OF CHICAGO, ET AL.,

Respondents.

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Now comes Cargill, Incorporated, Petitioner, by its attorneys, pursuant to Rule 33 of this Court, and prays for a rehearing of the order entered herein on April 26, 1948 denying its petition for a writ of certiorari.

In support thereof Petitioner respectfully submits the following substantial grounds available to Petitioner but not previously presented:

I.

The Decision of the Circuit Court of Appeals Dismissing the Amended Complaint and Depriving Petitioner of the Opportunity to Prove the Allegations Thereof is Contrary to the Decisions of This Court and of the Various Circuit Courts of Appeals, and Departs from the Established Practice under the Federal Rules of Civil Procedure.

The petition for certiorari (p. 7) raised the question whether the Amended Complaint alleged an unreasonable restraint of trade in violation of the Sherman Act, even if Regulations 1894 and 1899 did not constitute "price-fixing". However, the petition did not point out that the Circuit Court of Appeals erred in failing to pass upon the sufficiency of the Amended Complaint in its entirety and in considering only the allegations specifically pleading the enactment of said Regulations.

The opinion below (R. 69, 72) is devoted only to a consideration of the question whether these Regulations were in themselves legal. The court overlooked entirely the sufficiency of the allegations of the amended complaint contained in paragraphs other than those dealing with the enactment of said Regulations. For example, paragraphs 15 and 16, which make no reference whatsoever to either of these Regulations, definitely state a claim entitling Petitioner to relief in alleging a combination and conspiracy in restraint of interstate trade and commerce in grain and grain futures in violation of the Sherman Act to control and fix the prices of certain grain futures contracts, to limit and restrict trading in grain, and to thereby protect from financial loss certain persons, partnerships and corporations who were on the "short" side of the market (R. 35). The enactment of the Regulations 1894 and 1899 is subsequently pleaded

in paragraphs 17 and 25 respectively merely as steps in the unlawful combination and conspiracy (R. 35, 39).

Under the Federal Rules of Civil Procedure[1] with respect to the statement of a claim for relief and the principles applicable to the construction of a complaint upon the filing of a motion to dismiss under Rule 12(b)(6), the motion should have been overruled without regard to the sufficiency of the allegations in paragraphs 17 and 25 concerning Regulations 1894 and 1899.

The only requirement imposed by Rule 8(a) of the Federal Rules of Civil Procedure is that the complaint should contain "a short and plain statement of the claim showing that the pleader is entitled to relief"; and in subsection (e) of the same rule it is provided that "each averment of a pleading shall be simple, concise and direct." Rule 8(f) further provides that "all pleadings shall be so construed as to do substantial justice."

It is uniformly held that where a motion to dismiss is interposed under Rule 12(b)(6), the complaint must be construed in the light most favorable to plaintiff and all allegations of fact contained therein are deemed to be admitted.[2]

It is also well established that a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claim upon the trial

---

[1] In *Continental Collieries Inc.* v. *Shober*, 130 F. 2d 631, 635 (C.C.A. 3, 1942) it is stated:

> "Under the Federal Rules of Civil Procedure the function of the complaint is to afford fair notice to the adversary of the nature and basis of the claim asserted and a general indication of the type of litigation involved [Citing authorities] * * *. Technicalities are no longer of their former importance, and a short statement which fairly gives notice of the nature of the claim is a sufficient compliance with the requirements of the rules."

[2] *Carroll* v. *Morrison Hotel Corporation*, 149 F. 2d 404, 406 (C.C.A. 7, 1945); *Galbreath* v. *Metropolitan Trust Co.*, 134 F. 2d 569, 572 (C.C.A. 10, 1943); *Cohen* v. *U.S.*, 129 F. 2d 733 (C.C.A. 8, 1942).

of the case.[3] As stated in *Carroll* v. *Morrison Hotel Corporation*, 149 F. 2d 404, 406 (C. C. A. 7, 1945):

> "No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it, * * *"

So here, Petitioner should have been allowed to introduce evidence in support of its allegations that an unreasonable restraint was imposed by Respondents, and the order of dismissal was clearly erroneous. *Polk Co.* v. *Glover*, 305 U. S. 5, 8, 9 (1938) *Borden's Co.* v. *Baldwin*, 283 U. S. 194, 208–9, 213 (1934).

In *Package Closure Corporation* v. *Seal Right Co.*, 141 F. 2d 972, 978 (C. C. A. 2, 1944), an anti-trust action for treble damages, the court stated:

> "We see no reason whatsoever to believe that the Supreme Court intended its liberal rules governing pleadings to be inapplicable to a suit for treble damages. See *C. E. Stevens Co.* v. *Foster & Kleiser*, 311 U. S. 255, 260."

To the same effect is *Louisiana Farmers' Protective Union* v. *Great Atlantic & Pacific Tea Company*, 131 F. 2d 419 (C. C. A. 8, 1942). In that case, the complaint alleged a combination and conspiracy to control prices and to destroy competition in interstate trade in strawberries. The court, in reversing a judgment dismissing the complaint without giving appellant leave to amend, stated:

> (422) "The courts have always recognized the difficulty in actions of the character here, inherent in the nature of the

---

[3] *Fargo Glass & Paint Co.* v. *Globe American Corporation*, 161 F. 2d 811, 813 (C.C.A. 7, 1947); *Dennis* v. *Village of Tonka Bay*, 151 F. 2d 411, 412 (C.C.A. 8, 1945); *Continental Collieries Inc.* v. *Shober*, 130 F. 2d 631, 635 (C.C.A. 3, 1942); *Dioguardi* v. *Durning*, 139 F. 2d 774, 775 (C.C.A. 2, 1944); *Kohler* v. *Jacobs*, 138 F. 2d 440, 441 (C.C.A. 5, 1943); *Tahir Erk* v. *Glenn L. Martin Co.*, 116 F. 2d 865 (C.C.A. 4, 1941); *Leimer* v. *State Mutual Life Assurance Co.*, 108 F. 2d 302, 306 (C.C.A. 8, 1940); *Sparks* v. *England*, 113 F. 2d 579, 581 (C.C.A. 8, 1940); *Cohen* v. *U.S.*, 129 F. 2d 733, 736 (C.C.A. 8, 1942); *Garbutt* v. *Blanding Mines Co.*, 141 F. 2d 679 (C.C.A. 10, 1944); *U.S.* v. *Ass'n. of American Railroads*, 4 F.R.D. 510, 519 (D.C. Neb. 1945).

case, in setting forth in precise detail the acts constituting the alleged violations of the anti-trust laws. * * * (Citing cases) And since the adoption of the Rules of Civil Procedure, the cases require of the pleader only a plain and simple statement of his case in conformity to Rule 8(a), 28 U. S. C. A. following section 723c. It is not necessary to set out in detail the acts complained of nor the circumstances from which the pleader draws his conclusions that violations of the acts of Congress have occurred and the pleader has been damaged. *C. E. Stevens Co.* v. *Foster & Kleiser Co.*, 311 U. S. 255."

In the *Stevens* case this Court said (311 U. S. 255, 261 [1940]):

"The conspiracy, with its effect on interstate commerce, is alleged to have caused the petitioner great expense and loss of profits; to have restrained and prevented * * * 'all to the great injury and damage of the plaintiff.' * * * While these allegations are general, we cannot say that they are inadequate * * *"[4]

Thus, the court below erred in failing to consider the Amended Complaint in its entirety as sufficiently stating a claim under the anti-trust laws.

The Circuit Court of Appeals further erred in ignoring the fact that Regulations 1894 and 1899 were pleaded as part of the plan to carry out the unlawful conspiracy, and in holding that merely because such Regulations were, in themselves,

---

[4]For many other decisions applying liberal rules of pleading in civil anti-trust actions, and supporting the sufficiency of the complaint here, see: *Mitchell Woodbury Corporation* v. *Albert Pick Barth Co.*, 41 F. 2d 148 (C.C.A. 1, 1930); *Hicks* v. *Bekins Moving & Storage Co.*, 87 F. 2d 583, 585 (C.C A. 9, 1937); *Ballard Oil Terminal Corporation* v. *Mexican Petroleum Corporation*, 28 F. 2d 91 (C.C.A. 1, 1928); *Makan Amusement Corporation* v. *Trenton-New Brunswick Theatres Co.*, 3 F.R. D. 429 (D.C.N.J. 1944); *U. S.* v. *Johns-Manville*, 67 F. Supp. 291, 293 (D. C. Ill. 1941); *Stewart Warner Corporation* v. *Staley*, 42 F. Supp. 140, 145 (D.C. Pa. 1941); *Wm. F. Luebke Co.* v. *Manhardt*, 37 F. Supp. 13, 14 (D.C. Wis. 1941); *U.S.* v. *Standard Oil Company of California*, 7 F.R.D. 338, 340 (D.C. Cal. 1947); *Rivoli Operating Corporation* v. *Loew's Inc.*, 7 F.R.D. 219, 222 (D.C. N.Y. 1947); *Camrel Co. Inc.* v. *Skouras Theatres Corporation*, 8 Fed. Rules Serv. 8a 25, Case 4 (D.C. N.J. 1944).

lawful, the action should be dismissed. Such conclusion is directly contrary to the many decisions of this Court holding that although the means employed in an unlawful conspiracy may in themselves be lawful, yet they nevertheless become unlawful when they are, as here, but one of the steps in an unlawful plot. *American Tobacco Co.* vs. *United States* 328 U.S. 781, 809 (1946) affirming 147 F. 2d 93, 106, 107 (C.C.A. 6, 1944); *Aikens* v. *Wisconsin*, 195 U.S. 194, 206 (1904); *U.S.* v. *Reading Co.*, 226 U.S. 324, 357 (1912); *Swift & Company* v. *U.S.* 196 U.S. 376, 398 (1905).

As stated in *U.S.* v. *Patten*, 226 U.S. 525, 544 (1913):

> "* * * It hardly needs statement that the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *Montague & Co.* v. *Lowry*, 193 U.S. 38, 45–46; *Swift & Co.* v *United States*, 196 U.S. 375, 386–387."

See also, *Lynch* v. *Magnavox Co.*, 94 F. 2d 883, 891 (C.C.A. 9, 1938).

Accordingly, the Amended Complaint, when viewed in its entirety, was clearly adequate under the Federal Rules of Civil Procedure to require Respondents to answer and to put them on trial. As stated by Mr. Justice Brandeis in *Myers* v. *Bethlehem Ship Building Corporation*, 303 U.S. 41, 51, 52 (1938):

> "Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

Petitioner has been denied the opportunity of proving the clear and positive allegations of its Amended Complaint, and has not had its day in court. We submit that this grave error should be rectified by this Court.

II.

The Far Reaching Consequences of the Decision Below upon the Economy of the Nation Necessitate the Determination by This Court of the Vital Questions in Issue.

In considering the public importance of the questions involved, attention is called to the fact that while Respondent Board of Trade is the world's largest grain futures market there are 17 other contract markets under the jurisdiction of the Commodity Exchange Authority in which futures trading is conducted in various commodities (U.S. Department of Agriculture, Report of the Administrator of the Commodity Exchange Authority (1947), p. 7), and also a number of other commodity exchanges not designated as contract markets.[5] Some of these organizations already have rules and regulations comparable to those of Respondent Board. For the convenience of the court there are collected in the Appendix pertinent excerpts from the rules and regulations of various commodity exchanges and the New York and Chicago Stock Exchanges.

Although admonitions have been frequently made that a denial of a petition for certiorari is not to be considered as an affirmance by this Court in any way of the judgment entered below, it is fair to assume that the decision of the Circuit Court of Appeals, if allowed to stand, will be widely relied upon and followed in many instances. Respondent Board has on prior occasions taken similar action to that complained of here (R. 22), and if the stamp of judicial approval on such conduct remains, it will undoubtedly set the pattern for like action in the future on Respondent Board and on other Exchanges

---

[5]Among the "non-contract" markets is the defendant in *U. S.* vs. *New York Coffee & Sugar Exchange*, 263 U.S. 611 (1924) cited by Respondents in their Brief in Opposition, p. 17. In that case, the management of the Exchange was not involved in any unlawful combination and the Court in no way considered or passed upon the legality of action such as is complained of here.

which now have rules comparable to those of Respondent Board or which may subsequently adopt similar rules. Surely this Court does not wish to countenance action condemned in the following manner by a federal agency in the Federal Trade Commission Report entitled: "Economic Effects of Grain Exchange Actions, Affecting Futures Trading During the First Six Months of 1946" (Feb. 4, 1947):[6]

> "Events of the first six months of 1946 demonstrate from a new background of practical experience that failure of exchange managements to protect the validity of future contracts results in severe loss of public confidence. Loss of confidence was due primarily to pursuit by exchange managements of a vacillating policy which failed to insist that traders perform in accordance with the terms of contracts traded. *In this, the Chicago Board, having least effectively steered a straight course in accordance with the fundamental principles of validity of contracts and responsibility of traders, bears the heaviest burden of public criticism.*"[7] (Italics ours)

We submit that, in the public interest, it is imperative that this Court resolve the questions involved in such a way as will put an end to unlawful restraints such as those charged here. Otherwise the power of irresponsible private groups to control and regulate vital phases of interstate commerce will be asserted again whenever the selfish interests of Exchange managements shall be served thereby, and the breach in the protective wall of the anti-trust laws arising from the immunity now judicially bestowed upon Exchanges without Congressional sanction, will thus invite further impairment of the sanctity of contracts to the detriment of the public generally.

---

[6] A copy of this Report has been lodged with the Clerk of this Court.

[7] See also, Hearings Before the House Committee on Agriculture 80th Cong., 1st Sess., "Long-Range Agricultural Policy" (Part 4) (1947), pp. 578, 581, 582.

It is therefore respectfully urged, upon the grounds aforesaid, that this petition for rehearing be granted; that the order denying the petition for writ of certiorari be set aside; and that, upon reconsideration by the Court, the petition for writ of certiorari be granted.

LEO F. TIERNEY

LOUIS A. KOHN
Attorneys for Cargill, Inc., Petitioner
231 So. La Salle St.
Chicago (4), Ill.

DORSEY, COLMAN, BARKER, SCOTT & BARBER
Minneapolis, Minn.

MAYER, MEYER, AUSTRIAN & PLATT
Chicago, Ill.
of Counsel

CERTIFICATE

Leo F. Tierney, one of the attorneys for Petitioner herein, hereby certifies that this Petition is presented in good faith and not for delay, and that it is restricted to substantial grounds not presented in the Petition for Certiorari.

LEO F. TIERNEY

APPENDIX:

Excerpts from Rules and Regulations of Various Exchanges

I. COMMODITY EXCHANGES[1]

The Board of Trade of Kansas City, Mo.*

(Wheat, corn, oats, grain sorghums, bran, and shorts)

Rule 37: "Powers.—In addition to all other powers specifically vested in the Board of Directors by this Constitution, the Board of Directors shall have power: . . . (f) To establish the time and place of trading among members of this Association and the manner in which said trading shall be conducted, and provide regulations therefor. Members guilty of irregular trading may be fined, suspended, or expelled from this Association at the discretion of said Board of Directors. . . ."

Rule 38: "War Powers.—The Board of Directors, during the continuance of any war to which the United States shall be a party, shall have power from time to time thereafter to prohibit, until further action of the Board and notice thereof, trading for present or future delivery in any or all of the commodities traded in on its Exchange, or such trading for delivery in any particular month, including trading in settlement of any then existing future contracts.

"Whenever such trading for future delivery shall have been so prohibited, the Board of Directors shall appoint a committee of three from the membership at large, which committee shall fix, as of the day immediately preceding the first day on which said future trading shall have been prohibited, a fair and rea-

[1]Exchanges which are designated as contract markets under the Commodity Exchange Act (7 USC §5) are shown with an asterisk. The rules of such Exchanges were taken from copies on file with the Commodity Exchange Authority on Sept. 12, 1947.

sonable price at which existing contracts shall be settled; and the price so established shall, without the payment of any penalty, be the basis on which settlements of such contracts for future delivery shall be made.

"Subject to the provisions of the Commodity Exchange Act, as amended, the Board of Directors, whenever the public welfare, or the best interests of the Association shall in its judgment seem to require, shall have power to suspend, during the continuance of any war to which the United States shall be a party, the operation of any rule of the Exchange, and also to fix a maximum price for any commodity dealt in on its Exchange, above which price no member shall thereafter and during the maintenance of said maximum price be permitted to make a trade in such commodity.

"Any action of the board of Directors under this rule shall be binding on all members of the Association, from and after the hour when the same shall be posted on the bulletin board in the Exchange room.

"Any member making a trade, or refusing to make a settlement, or doing any act in violation of this rule, shall be deemed to have been guilty of a grave offense involving the good name of this Association, and shall be liable to punishment as provided in Rule 152."

Minneapolis Grain Exchange* (Wheat, oats, and rye)

Section 418 of the general rules: "Powers of the Board of Directors to regulate trading, close the Exchange, etc.—The Board of Directors shall have the power from time to time to fix the hours of trading and to declare any day to be a holiday.

"When in the opinion of the Board of Directors an emergency exists, the Board shall have the power from time to time to:

a. Close the Exchange;

b. Suspend trading in any or all Futures Contracts, including trading in settlement of any then existing Futures Contracts;

c. Prohibit trading during any day in any or all Futures Contracts at prices more than a specified limit above or below the average closing prices of the preceding business day;

d. Prohibit trading in any or all Futures Contracts at prices above or below such limits as are specified by the Board;

e. Limit the total amount of open speculative Futures trades which any Member or any Registered Firm or Corporation, or which any customer of any such Member, Firm, or Corporation may have at any one time in any or all commodities, and to increase or decrease or cancel such limitations as the Board of Directors deems advisable. The Board of Directors may require such reports and may make such Regulations as it deems necessary to enforce such limitations;

Provided, However, that the establishing of any such limit shall not be deemed to require that total amounts of such trades acquired before the effective date of such limitations be reduced to such limit;

f. Adopt Regulations to conform with orders, recommendations or requests from any duly constituted governmental authority, or which in the opinion of the Board of Directors are necessary and appropriate."

Milwaukee Grain Exchange* (Wheat, corn, and oats)

General rule 4: "During such period as the United States shall be at war with any foreign country, the Board of Directors shall have power to prohibit the making of contracts for the present or future delivery of property traded in on the Ex-

change, and to limit or restrict such trading in such manner as the public welfare and the best interests of the Association may demand, either by the imposition of a maximum price above which no member shall make a contract, or otherwise.

"In the event that trading for future delivery shall have been so prohibited the Board of Directors shall appoint a committee, consisting of three members of the Association, whose duties shall be the determination of a fair and equitable price at which existing contracts shall be settled and such price shall be the basis upon which settlements of such contracts for future delivery shall be made.

"A violation of the provisions of this section shall be deemed a grave offense against the good name of the Association and shall render the member guilty of such violation liable to the penalties imposed by Section 11 of Rule 4."

Merchants' Exchange of St. Louis*
(Bran, shorts, middlings)

Provision 365 of rules: "Whenever the Board of Directors shall find and declare that there is an artificial congestion, condition, corner, scarcity, unwieldly surplus, a financial situation, emergency, war, or disturbance, that tends to make trading in a commodity or any commodities on the Exchange either for cash, deferred shipment, to arrive, or future delivery, abnormally hazardous or unsafe to the members or the public, or affects the good name of the Exchange, the Board, by an affirmative resolution of two-thirds of the Board members present and six members shall be required for a quorum for such purpose, may adopt and enforce one or more of the following regulations:

(a) That trading between members be confined to the closing out of existing contracts and that there shall not be

any further trading in any month on any commodity or commodities for a definite period or until further notice.

(b) That there shall be no trading, during any specific day or period, in any commodity or commodities, at prices more than a definite amount or per cent above or below the previous day's closing price.

(c) Cease trading in any commodity or commodities for a definite time or until further notice.

(d) Establish for a definite period or until further notice, a contract value on any commodity or commodities in any month, on which all open contracts between members shall be cashed, liquidated or closed.

(e) Limit the total amount of contracts in any commodity or commodities which may be open at any one time or during any period, also the amount which may be open for any one member or non-member or firm or corporation at any one time.

"Any of which regulations may be rescinded at any time by two-thirds' affirmative vote of the Board members present, six members being required for a quorum for this purpose."

Duluth Board of Trade* (Wheat)

Rule XV, section 2: "The Board of Directors during the continuance of any war to which the United States shall be a party, shall have the power from time to time to thereafter prohibit, until further action of the Board and notice thereof, trading for present or future delivery in any or all of the commodities traded in on its exchange, or such trading for delivery in any particular month, including trading in settlement of any then existing future contracts. Whenever such trading for future delivery shall have been so prohibited, the Board of Directors shall appoint a committee of three from the membership at large, which committee shall fix, as of the day immediately pre-

ceding the first day on which said future trading shall have been prohibited, a fair and reasonable price at which existing contracts shall be settled and the price so established shall, without the payment of any penalty, be the basis on which such settlement of such contracts for future delivery shall be made. The Board of Directors, whenever the public welfare or the best interests of the Association in its judgment seem to require, shall have power to suspend, during the continuance of any war to which the United States shall be a party, the operation of any rule of the Exchange, and also to fix a maximum price for any commodity dealt in on its Exchange above which price no member shall thereafter and during the maintenance of said maximum price, be permitted to make a trade in such commodity. Any action of the Board of Directors under this section shall be binding on all members of the Association, from and after the hour when the same shall be posted on the bulletin board in the Exchange room. It shall be the duty of the Board of Directors to investigate any complaint of a violation of this rule, and if the member accused shall be found guilty, he may be censured or fined, suspended or expelled, after charges made and a hearing and determination thereon by the Board of Directors in the manner prescribed in Section 12 of Rule IV."

New York Cotton Exchange*

Bylaws, section 1.38. "(d) If the Board of Managers in a meeting declares by a majority vote of the entire Board that an emergency situation exists that makes certain designated open contracts on the New York Cotton Exchange impossible of fulfillment or that the fulfillment thereof may be prejudicial to the public interest or the equitable principles of trade or the welfare of said Exchange, said Board in said meeting or any adjournment or adjournments thereof may by a majority vote of the whole Board, accord relief in the manner and time as in its judgment such situation requires.

"(2) Without in any way limiting the authority herein conferred upon the Board of Managers, the intention hereof is that in a situation provided for in the foregoing paragraph, said Board in meeting may by a majority vote of the whole Board, require the liquidation of such contracts that it may designate, in the manner and time and at such settlement price or prices as it may determine, with due regard for the rights of all interested parties. The measures that the Board may invoke hereunder in such situation may be modified or revoked in whole or in part by a majority vote of the whole Board in meeting assembled.

"(3) Any member failing to conform to such regulations or measures, thus adopted, may be suspended from all rights of membership for a term not to exceed one year, or may be expelled from membership in the Exchange, by the Board of Managers."

Bylaws, section 8.08. "(1) The Board of Managers, or in the absence of a quorum thereof, the Executive Committee, may in the discretion of either, without previous notice, close the Exchange on such days, or portions of days, as will in the judgment of either serve to promote the best interests of the Exchange.

"(2) During such periods as the market may remain closed in accordance with action by the Board, or by the Executive Committee under the paragraph immediately preceding, all matters relating to notices, deliveries, margin calls, clearing house settlements, or other Exchange or Contract requirements shall remain in status quo without prejudice thereby to any interest concerned and the subsequent rulings of the Board with respect thereto shall be binding on all parties in interest, anything in these By-Laws to the contrary notwithstanding."

Chicago Mercantile Exchange* (Butter, eggs, potatoes)

Rule 943. "Emergency Termination of Trading.—When, in the opinion of the Business Manager the volume of trading

indicates that the purchases and sales are in excess of the visible supply of a particular commodity, and/or an emergency exists, and the Clearing House Committee concurs, the Manager may order one or more of the following limitations on trading:

"(a) That trading be confined in any specified commodity between those already committed and that such trading be limited to the closing out of their open contracts.

"(b) That there shall be no trading during any particular day in any specified commodity at prices more than a certain amount to be fixed by the Clearing House Committee, above or below the settling price of the preceding day.

"When, in the opinion of the Business Manager, an emergency exists and the Clearing House Committee cannot be called into session promptly enough to meet the emergency, the Business Manager, with the consent of either the President or the Chairman of the Clearing House Committee, may exercise the authority vested by this rule in the Clearing House Committee.

"The Board itself may exercise any of the discretion, authority, and power which by this Rule is vested in the Clearing House Committee and other representatives of the Exchange. The Board may also, when it deems that an emergency exists, stop trading in any future contracts and, notwithstanding any other Exchange rules, determine the manner in which deliveries shall be made or fix a settlement price at which all such contracts shall be closed out.

"All Exchange contracts shall be subject to this rule and shall be modified to the extent necessary to comply with the action taken under it."

New York Mercantile Exchange*
(Butter, eggs and potatoes)

Clearing House rule 39-A: "If during a national emergency, such as war, famine, etc., the Executive Committee feels that it would be to the national interest to stop future trading, it may do so by a two-thirds majority affirmative vote of the entire committee, by specifying a date of closing and fixing settling prices for all open contracts."

Wool Associates of the New York Cotton Exchange, Inc.*
(Wool tops)

Delivery rule 12A: "Whenever through any exceptional contingency not provided for in the By-Laws and Rules, deliveries are not possible, and an extraordinary situation arises wherein a rigid enforcement of contracts generally would be grossly at variance with just and equitable principles of trade or the public interest, then upon application of any member, and after investigation, the Board of Governors, by a two-thirds vote of the whole Board, may accord relief in such manner as in their judgment the emergency may demand, with due regard, however, to upholding the rights of both buyer and seller and the fulfillment of their just obligations and to the best interests of the Exchange."

Memphis Merchants Exchange Clearing Association*
(Cottonseed and soybean meal)

Bylaws, article II, section 6: "Without prejudice to the general powers conferred, it is expressly declared that the Board shall have the following powers, to-wit: . . . (d) To declare that an emergency exists and may change the published limits or daily price fluctuations, place a minimum or maximum limit on prices or suspend trading altogether, EXCEPT that transactions for the current month shall be cleared in the customary manner during the last three trading days of that month. . . ."

New Orleans Cotton Exchange*

Rule 34, Section 3: "No day, except a legal holiday, can be declared a holiday, and the transaction of business in futures be suspended, unless five business days' official notice shall have been given; provided, that the Board of Directors may, by two-thirds majority of its members present and voting, have the power in their discretion, without previous notice, to close the Exchange on such days or portions of days as will, in their judgment serve to promote the best interest of the Exchange."

New York Produce Exchange* (Cottonseed and soybean oil)

Bylaws, Section 67-A: "The Board of Managers shall have full power and authority at any time and from time to time, by resolution adopted by a majority of the whole Board, to make, determine, fix, alter, vary and change the rules regulating purchases and sales of, and general trading in, any commodity futures dealt in on the floor of the Exchange, including, without limiting the generality of the foregoing, the power and authority to require the furnishing of information by the members and to make investigations of all transactions in commodity futures and to subpoena records and to alter or abolish credits which may be given, and to increase or decrease margin requirements in futures transactions and to prohibit futures transactions in any commodity, anything contained in the rules and regulations governing transactions in any commodity futures on the floor of the Exchange, as now existing or as hereafter changed or amended, to the contrary notwithstanding."

New York Coffee and Sugar Exchange, Inc.

Bylaws, Section 110: "Whenever through any exceptional contingency not provided for in the By-Laws and Rules a situation of such extreme urgency arises that a rigid enforcement of contracts generally would be grossly at variance with just and equitable principles of trade, the Board of Managers, by a two-

thirds vote of the whole Board, may accord relief in such manner as in their judgment the exigencies of the emergency demand, with due regard, however, to upholding the just rights of both buyer and seller in their obligation to fulfill their contract and to serving the best interests of the Exchange.

"Such regulations or measures shall become effective at such times as the Board may determine, and remain effective until abrogated by a two-thirds vote of the entire Board."

New York Cocoa Exchange, Inc.

Chapter I, By-Laws, Powers of the Board of Managers:

Section 3A, p. 1–2:

"Whenever as the result of an act of any government, or any political sub-division of any government, or of a general financial panic, riot, war, rebellion, pestilence, plague, calamity or any other exceptional contingency not provided for in the By-Laws and Rules, an exceptional situation of such extreme urgency arises that the rigid enforcement of contracts would be grossly at variance with just and equitable principles of trade, the Board of Managers by a two-thirds vote of the whole Board may accord relief in such manner as in its judgment the exigencies of the emergency demand, and in connection therewith may suspend, abrogate or modify any provisions of the By-Laws and Rules, or the operation and obligations thereof, with due regard, however, to upholding the rights of both buyer and seller and the fulfillment of their just obligations and to serving the best interest of the Exchange.

"In the event that any members of the Board of Managers shall be unable by reason of absence from the City or illness, to attend the meeting of the Board at which any such action is taken or considered, a two-thirds vote of those members of the Board who are not so prevented from attending, shall be sufficient for the adoption of any resolution under this section.

"Under the conditions hereinabove set forth and for the purpose of making effective the provisions of this section a majority of the members of the Board of Managers, present at any meeting called informally and without formal notice for the purpose, shall have authority either to postpone the opening Call of the Exchange or to suspend trading on the Exchange for thirty-minute intervals until such time as the Board of Managers can be convened."

Chapter 9, p. 80, By-Laws, Amendment and Interpretation of By-Laws and Rules

Procedure for Addition or Amendment to By-Laws—Section 165:

"A proposed addition or amendment to the By-Laws shall be submitted at a meeting of the Board of Managers, and a copy of said proposed addition or amendment shall then be sent to each member of such Board. At a subsequent meeting of the Board of Managers, such proposed addition or amendment may be approved by a two-thirds vote of the members of the Board present and voting at said meeting. After approval by the Board of Managers, the proposed addition or amendment to the By-Laws shall be submitted to a vote of the members of the Exchange at a meeting called for that purpose, of which meeting ten days' notice, stating specifically the addition or amendment proposed, shall have been served, delivered or mailed in the manner prescribed in Section 69 for the calling of special meetings. The addition or amendment may be adopted by the affirmative vote of a majority of the members, voting by ballot, present at said meeting.

"Any alteration of the By-Laws relating to contracts made under the provisions of this Section shall be binding on all contracts entered into before as well as after its adoption, provided such alteration does not affect the amount of money to be paid or received or the quality of the merchandise to be received or delivered under such contract."

Commodity Exchange, Inc. (New York)
(Silk, rubber, and metals)

Section 137, Government By-Laws, Emergency Relief Powers:

"In the event of an emergency by reason whereof the ordinary media of exchange and payments are not available for exchange transactions, the Board may by a two-thirds vote of the entire Board adopt such regulations or measures as may in its opinion meet the emergency, and in connection therewith may abrogate or modify any provision of the By-Laws or the operation or application thereof relating to the subject, and may provide for such means and methods of payment as may be adopted by trade or authorized by law; with due regard, however, to upholding the rights of both buyer and seller and the fulfillment of their just obligations and to the best interests of the Exchange. Such regulations or measures shall become effective at such time as the Board may determine, and remain effective until abrogated by a two-thirds vote of the entire Board."

Section 408, General Trading By-Laws:

"Holidays and Suspension of Trading (amended Jan. 26, 1940)

"The Board of Governors may, in its discretion, without previous notice upon such notice as it may prescribe,—(a) close the Exchange for trading or for all business,—(b) suspend trading in any commodity, or in a contract for any commodity,—(c) suspend trading for any delivery month or months for any commodity; on such day or days, or portion of day or days, or for such period of time, as may, in its judgment, serve to promote the best interests of the Exchange or of the public. Any action under the foregoing provisions shall be binding on all members."

"The exchange shall be closed for all business on such

days as are observed as legal holidays in the State of New York."

Section 409: "Market Equilibrium (Adopted October 11, 1935)

"Whenever it shall appear that an interest has been created, or a situation exists in respect to any delivery month or months which endangers, or may endanger the normal functioning of the Exchange or of the market, or that conditions have arisen that jeopardize the maintenance of a free open and orderly market, or that jeopardize the fulfillment of outstanding contracts or that threaten to conflict with the best interests of the Exchange or of the public, whether such interest or such conditions may involve a violation of the By-Laws or Rules of the Exchange or not, the Board of Governors, by a vote of two-thirds of those present and voting, but in no event by less than twelve affirmative votes, may itself or through any regular or special committee appointed by the Board, investigate the situation or interest; and for the purposes of such investigation the Board, or such regular or special committee, shall have all of the powers and authority vested by the By-Laws in the Committee on Business Conduct. If the Board shall conclude that such an interest, situation or condition exists, or that the best interests of the Exchange or of the public are or may be threatened, it shall have the power and authority, after affording an opportunity for the interested members to be heard, to require the member or members involved therein to take such steps as the Board may deem necessary to avert, regulate or correct the conditions in question, and for that purpose may require such member, or members, to liquidate in whole, or in part, their position or positions within such time and upon such terms as may be fixed by the Board, or to take such other steps as may be deemed necessary or desirable in the discretion of the Board. In the event a member fails to comply promptly with such requirements as the Board may prescribe, he shall be subject to censure, fine, suspension or expulsion under Section 210 of the By-Laws."

II. STOCK EXCHANGES

New York Stock Exchange

Article III—Section 8: "Constitution—Board of Governors:

"Whenever in the opinion of the Board of Governors a corner has been created in a security admitted to dealings on the Exchange or a single interest or group has acquired such control of a security so admitted that the same cannot be obtained for delivery on existing contracts except at prices and on terms arbitrarily dictated by such interest or group, the Board may postpone the time for deliveries on Exchange contracts therein, and may from time to time further postpone such time or may postpone deliveries until further action by the Board, and may at any time by resolution declare that if such security is not delivered on any contract calling for delivery thereof at or before the time to which delivery has been postponed or which has been fixed by the Board for such delivery, such contract shall be settled by the payment to the party entitled to receive such security or by the credit to such party of a fair settlement price as agreed by the parties to the contract, or if the parties to any contract which is to be settled on the basis of such fair settlement price do not agree with respect thereto, such fair settlement price and date for the payment of same may be fixed by the Board. The Board before fixing the same shall give the parties to the contract which is to be settled on the basis thereof an opportunity to be heard either before the Board or before a committee authorized for the purpose. Any such committee shall report the testimony together with its conclusions thereon to the Board which may act upon such report without further hearing or may accord the parties a further hearing before acting thereon."

Chicago Stock Exchange

Constitution, Article 4, Sec. 1: "In the exercise of its powers, it (Board of Governors) may adopt such rules, issue such orders and directions, and make such decisions

as it may deem appropriate. It may delegate any of its powers to any standing or special committee. Whenever it shall appear to the board of Governors that an *emergency* exists, it may delegate all of its powers, for such a period as it may determine, to a special committee, a majority of which shall be members of the exchange . . . "

Article 4, Sec. 10: "Whenever in its opinion such action is called for by the public interest or by just and equitable principles of trade, the Board of Governors may suspend all trading on the exchange, or may extend or postpone the time for the performance of Exchange contracts, or, prior to performance may cancel the same, or may determine the terms upon which any Exchange contract or contracts shall be settled, and in case it finds that a free and open market in the purchase or sale of any security does not exist upon the exchange, it may, in addition to the powers hereinbefore granted, temporarily suspend trading in any such security."

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 671

CARGILL, INCORPORATED,
Petitioner,

vs.

THE BOARD OF TRADE OF THE CITY OF CHICAGO, et al.,
Respondents.

RESPONSE TO PETITION FOR REHEARING ON ORDER OF DENIAL OF PETITION FOR WRIT OF CERTIORARI.

Nothing set forth in the Petition for Rehearing warrants a reversal of the order of this Court which denied the Petition for a Writ of Certiorari.

Petitioner states that the Petition for a Writ of Certiorari raised the question whether the Regulations 1894 and 1899 of the Board of Trade of the City of Chicago constituted an unreasonable restraint of trade in violation of the Sherman Act, but that the Petition did not point out the asserted error of the court below in failing to pass upon the sufficiency of the Amended Complaint "in its entirety". (Pet. for Reh. pg. 2.) Petitioner then argues that if the general allegations of combination and conspiracy, etc.,

contained in paragraphs 15 and 16 of the Amended Complaint, be accorded controlling importance, the Amended Complaint does state a claim upon which relief can be granted.

None of the decisions cited in the Petition for Rehearing supports the proposition that the specific facts of the case well pleaded may be disregarded. The allegations of the Amended Complaint taken as an entirety are comprehensive and specific concerning the adoption of Regulations 1894 and 1899 and concerning the supposed damage sustained by petitioner from the operation and enforcement of said Regulations. Because the facts alleged in the Amended Complaint upon which the petitioner bases its claim disclose affirmatively the non-existence of any claim upon which relief can be granted, it follows that this cause was properly adjudicated on the pleading below and that the denial of a Writ of Certiorari by this Court was proper.

In now asking that the Court consider whether the generalizations and characterizations in petitioner's pleading warrant the granting of a Writ of Certiorari it would appear that petitioner is not presenting a new *ground* for allowance of the writ, within the meaning of Rule 33, but is advancing a new question of alleged error below not previously raised, in disregard of Rule 38 and the policy of the Court. (Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, pp. 552-553.)

Petitioner states that the decision below has "far-reaching consequences" (Pet. for Reh., pp. 7-9), and in support of this assertion as a reason for rehearing presents what is essentially the same argument made by it in the petition for a Writ of *Certiorari* (Pet. for Cert., pp. 18-24). Petitioner also refers to the emergency rules of various ex-

changes, not appearing in the record (Pet. for Reh., pp. 7, 11-26). But Rule 33 of the Court makes no provision for the filing of a petition for rehearing which suggests grounds already urged in the original petition for certiorari, or which is based upon matter not appearing of record.

Finally, Rule 33 requires that the grounds not previously urged, upon which rehearing is sought, must be "substantial". The Petition for Rehearing considered as a whole is not based upon any ground which is substantial, within the meaning of Rule 33, and for that reason, also, rehearing should be denied. (*A. B. T. Manufacturing Corp.* v. *National Slug Rejectors, Inc.*, No. 506, 92 L. Ed. 583.)

Respectfully submitted,

.....
WEYMOUTH KIRKLAND,

.....
HOWARD ELLIS,

.....
WILLIAM H. SYMMES,

.....
ANDREW C. HAMILTON,

.....
BENNITT E. BATES,

Attorneys for the defendants Board of Trade of the City of Chicago, Board of Trade Clearing Corporation, and certain other defendants,

33 North LaSalle Street
Chicago 2, Ill. Randolph 2929

.....

WALTER BACHRACH,

.....

WALTER H. MOSES,

.....

STANLEY MORRIS,

Attorneys for the defendants Frank A. Miller and Emmett G. Barker,

231 South LaSalle Street,

Chicago 4, Ill. State 6862

.....

FLOYD E. THOMPSON,

.....

FREDERICK MAYER,

.....

ABRAHAM L. RITTENBERG,

Attorneys for the defendant J. O. McClintock,

11 South LaSalle Street,

Chicago 3, Ill. Randolph 0220